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No.

Supreme Court, U.S.

FILED

FEB 4 1987

JOSEPH E. SPANIOLO, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1986

RAYMOND C. AHLBERG, *et al.*,

Petitioners,

vs.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL
CIRCUIT**

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2317



QUESTIONS PRESENTED

1. May a federal employee be separated in violation of applicable regulations?

2. May a federal employee separated in violation of applicable regulations be denied remedy, without a finding that he or she would have been separated had the regulations been followed?

LIST OF PARTIES

The petitioners in the court cases below were:

Raymond C. Ahlberg; John J. McCall; William Cox; Thomas J. Cummings; Walter B. Day; Lawrence S. Faye; Lawrence M. Kelly; Arthur Leen; Nelson G. Newton; Ann P. Shields; Mary L. Tierney; Scheryl Williams; Dorothy M. Hayes; Sherry Firobed; Gerald F. Thurston; Donald L. Wakefield; James G. Brown; Isaiah C. Celestine; June A. Dickerson; Ruth K. Kampschroeder; Lawrence P. Lillis; Bernard S. Horowitz; Betty J. Kaufman; Daisey Janey; Hamad Negron; Jessie B. Poole; Betty M. Hunter; Sandra M. Stowers; Floye Sumida.

The respondent in the court cases below was:

U.S. Department of Health and Human Services.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED
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CIRCUIT**

The petitioners Raymond C. Ahlberg, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered on November 13, 1986.

The petitioner Floye Sumida respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered on October 6, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals in the case of petitioners *Ahlberg, et al.*, is published as *Ahlberg v. Dept. of Health and Human Services*, 804 F. 2d 1238 (Fed. Cir. 1986) (Appendix, *infra*, 1a). The opinion of the Court of Appeals in the case of petitioner Sumida is unreported and appears in the appendix at 36a. The administrative decisions are found at 38a through 211a.

The cases had previously been consolidated for decision on common issues of law and fact. The Court of Appeals opinion in the consolidated case is published as *Certain Former CSA Employees v. Dept. of Health and Human Services*, 762 F. 2d 978 (Fed. Cir. 1985) (236a). The consolidated administrative decision is published as *Certain Former CSA Employees v. Dept. of Health and Human Services*, 21 M.S.P.R. 379 (1984) (377a).

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit in the *Sumida* case was entered October 6, 1986. The Chief Justice granted an application for an extension of time in which to submit a petition for writ of certiorari, setting the new deadline as February 4, 1987.

The judgment of the Court of Appeals for the Federal Circuit in the cases of the other petitioners, *Ahlberg v. Dept. of Health and Human Services*, 804 F. 2d 1238 (Fed. Cir. 1986), was issued November 13, 1986. Timely petitions for rehearing were denied on December 17, 1986 (447a-449a).

This Court is given jurisdiction to review the judgments of the Court of Appeals by 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED

The case is based on the transfer of function statute, 5 U.S.C. § 3503; the regulation implementing that statute, 5 C.F.R. § 351.302(a) and 351 Federal Personnel Manual ¶ 5-3(e); and the reduction in force regulations, 5 C.F.R. Part 351.

STATEMENT OF THE CASE

The petitioners — former employees of the Community Services Administration ("CSA") — were all separated from federal service, in violation of their entitlement to transfer to the Department of Health and Human Services ("HHS") under regulations implementing the transfer of function statute, 5 U.S.C. § 3503.¹ HHS needed only some of the over 900 employees illegally denied transfer (415a);² the required procedure, however, obligated HHS to accept all CSA employees, without break in employment, and then conduct a proper reduction in force, so that employees entitled to retention could be correctly identified. 351 Federal Personnel Manual ¶ 5-3. Thus, it was HHS's initial error in

1. The regulations are found at 5 C.F.R. § 351.302(a) (1981) and 351 Federal Personnel Manual ¶ 5-3(e). At the time CSA closed, HHS denied the statute applied. The United States District Court for the District of Columbia rejected that contention, and HHS did not appeal. *National Council of CSA Locals v. Schweiker*, 526 F. Supp. 861, 864 (1981) (420a). The District Court declined to determine which particular functions transferred or which employees were entitled to transfer, holding that any HHS error on these points would be corrected on appeal to the Merit Systems Protection Board (442a). The court found that *Sampson v. Murray*, 415 U.S. 61, 90-92 (1974) barred even preliminary relief, for the back pay remedy available from the Board meant there was an adequate remedy at law (442a).

2. Shortly after the District Court decision, n. 1 above, HHS conceded that each CSA employee was identified with a function transferred to HHS (331a), and that each CSA employee thus had statutory and regulatory transfer rights (331a-332a).

refusing to recognize that CSA functions had been statutorily transferred that meant that all the CSA employees were separated on September 30, 1981, rather than transferred to HHS.

Although admitting this violation of the regulation, HHS said it would not reinstate any employee who would have been separated had a reduction in force been held concurrent with the transfer (361a-362a). HHS said further, however, that because of the government's failure to maintain records necessary to conduct a proper reduction in force, it had devised an ad hoc method for determining reduction in force retention rights, and would rely on this method to determine who should get remedy (362a-363a).

In cases consolidated before the MSPB (including petitioners' cases), the MSPB rejected the employees' argument that the removals in violation of the transfer regulations were nullities (415a). It also rejected its Administrative Law Judge's recommendation (374a) that the appellants be considered to have maintained employment status until the ad hoc reduction in force calculations began to be made in January 1982 (418a). The MSPB's disposition of the claim that the reduction in force regulations had to be followed in any remedy calculations is not clear. The decision did remand the consolidated cases for individual hearings to determine their retention rights (416a-419a).

On petition for review of the consolidated MSPB decision, the U.S. Court of Appeals for the Federal Circuit held that the erroneous failure of a federal agency to accept an employee entitled to transfer under the regulations does not render the ensuing separation a nullity (261a-262a). As to the method for determining whether an employee could have been separated through reduction in force, the court held that the *ad hoc* method violated reduction in force regulations (264a-265a), noted that the result is that some employees may have been denied the placement they were entitled to under the regulations (265a), and described the MSPB remand

proceedings as designed to enable those employees to obtain remedy (265a-266a). The court specifically rejected the contention that complying with reduction in force regulations was now impossible, stressing that HHS itself had identified a method by which the necessary records now could be created (267a-268a). Based on these findings, the court affirmed the MSPB decision (277a).

Individual MSPB hearings then commenced around the country.

The MSPB hearing officers in Seattle and Boston interpreted the consolidated board and court decisions as holding that remedy should be granted if the employee would have survived a properly conducted reduction in force concurrent with the transfer of function (197a, 224a-225a). They held that the present petitioners from those regions would have been separated had the reduction in force regulations been complied with (197a-204a). These petitioners bring two contentions to this Court. First, under *Vitarelli v. Seaton*, 359 U.S. 535 (1959), when an agency in fact does not follow required procedures and standards in separating a federal employee, the remedy is reinstatement with back pay, subject to further lawful separation action, which may not be given retroactive effect. Second, if remedy can be denied on the basis of subsequent calculations that the employee might have been removed through reduction in force, the retroactive removal cannot be effective earlier than the agency could have originally done the calculations — in this case, January 1982.

The MSPB hearing officers in Atlanta and Kansas City interpreted the consolidated board and court decisions as holding that remedy should be granted only if the employee would have survived a reduction in force conducted under the HHS ad hoc procedures (31a).³ Thus, at these hearings only the ad hoc method

3. When the question was finally presented to the full board, it adopted
(Cont'd)

was applied; HHS made no effort to show, and no finding was made, that these petitioners would have been separated if the reduction in force regulations had been followed. On review, the Court of Appeals held that in its decision in *Former CSA Employees* it had granted the MSPB the discretion to follow the reduction in force regulations or not (33a), and that approval of allowing separations to stand even if not achievable under the regulations was "implicit" in that decision (32a). The Atlanta and Kansas City petitioners thus make an additional contention in this Court: that federal regulations are binding on agencies, and thus the courts may not grant agencies discretion to violate them.

The Federal Circuit has now held, in a series of published opinions, that federal agencies need not comply with personnel regulations and that discharges in violation of those regulations may be condoned. Petitioners seek relief from this set of holdings.

REASONS FOR GRANTING THE WRIT

I.

REFUSING TO ~~NULLIFY~~ SEPARATIONS IN VIOLATION OF THE TRANSFER REGULATION CONFLICTS WITH THE CONSISTENT HOLDINGS BY THIS COURT THAT AGENCIES MUST COMPLY WITH THEIR REGULATIONS AND THAT EMPLOYEE REMOVALS IN VIOLATION OF REGULATIONS ARE NULL AND VOID.

The Federal Circuit's toleration of agency regulatory violations contradicts *United States v. Nixon*, 418 U.S. 683 (1974); *Morton*

(Cont'd)

the ad hoc procedures interpretation of the consolidated decisions. *Belton v. Dept. of Health and Human Services*, 31 M.S.P.R. 414 (1986); *Putnam v. Dept. of Health and Human Services*, 31 M.S.P.R. 427 (1986).

v. Ruiz, 415 U.S. 199 (1974); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); and *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). These cases uniformly held that federal agencies are bound by their regulations.

In this case, moreover, there is no dispute over the premises of the petitioners' argument: each was found to be identified with a transferred function (258a, 331a); any employee identified with a transferred function is entitled to transfer prior to any associated reduction in force, 5 C.F.R. § 351.302(a); solely because of the agency's initial erroneous failure to recognize their transfer rights, all were separated rather than being transferred. As *Vitarelli* explained, employee removals in violation of applicable regulations are illegal and of no effect:

Because the proceedings attendant upon petitioner's dismissal from government service on grounds of national security fell substantially short of the requirements of the applicable departmental regulations, we hold that such dismissal was illegal and of no effect.

359 U.S. at 545.

The holding is emphasized by Justice Frankfurter's partial concurrence:

[I]f dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See *Service v. Dulles*, 354 US 363 []. This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with that

sword. Therefore, I unreservedly join in the Court's main conclusion, that the attempted dismissal of Vitarelli in September 1954 was abortive and of no validity because the procedure under Department of Interior Order No. 2738 was invoked but not observed.

359 U.S. 535, 547 (separate opinion).

The Court of Appeals distinguished this case from *Vitarelli* on the ground that here, had the agency desired to do so it could have carried out a proper reduction in force and removed most of the former CSA employees:

The present case is far removed from *Vitarelli*. There only a single employee was involved, the Court held that he had been improperly discharged from his position, and it ordered him reinstated to the position he had occupied. The present case, in contrast, involved a reduction-in-force in which more than 900 employees sought reinstatement with a new agency that had only 165 positions to fill. There is no way in which the Office of Community Services could have hired all the former employees of the Community Services Administration. Only a relatively small percentage of the Community Services Administration employees were entitled to employment at the Office of Community Services. All or most of the employees so entitled, in fact, may have been hired. We decline to extend the principle applied in *Vitarelli* (and in the other similar cases upon which petitioners rely) to the wholly different factual situation here.

Ironically, the case for reinstatement as a remedy for an improper removal is in some senses actually stronger here than in *Vitarelli*. The Court in *Vitarelli* knew for a certainty that the agency had determined, not once but twice, to rid itself of the particular employee. Here, it may be assumed that the agency would have wanted to rid itself of numerous employees, but it is certain that as of October 1, 1981 the agency had not identified the present petitioners (or any other individuals) as targets for removal. In addition, there was no doubt in *Vitarelli* that the agency could have properly removed him on the date that it had improperly removed him. The entire litigation would have been avoided if the discharge notice had been written slightly differently. Here, HHS did not even acknowledge that the petitioners had transfer rights until November 1981 (330a-331a, 335a), so it could hardly have decided in October to separate them. Indeed, the Administrative Law Judge who heard the consolidated cases for the board had recommended that the employees at least be given back pay until the date the agency began its ersatz reduction in force calculations:

I believe recovery of backpay from October 1, 1981 should cease as of the date the first offers of employment were transmitted to appellants in January 1982; as of that date a valid reduction in force is deemed to have been instituted, thus fixing the rights of the appellants, even though notices of non-selection were sent to some at a later date. . . . In my view, the earlier date is consistent with the theory of a constructive reduction in force in which the competing interests of CSA employees were determined and settled when the master register was established.

(374a, 375a).⁴

4. The ALJ's recommendation was rejected by the board, on the ground that
(Cont'd)

In any event, in our case the regulations are designed to bar precisely the procedure followed here — separating all the transfer-entitled employees first, and then some time later recognizing the transfer rights of some. The regulations explicitly require that the transfer rights be honored, and then, if necessary, a proper reduction in force be carried out to reduce the number of employees to those desired by the receiving agency:

Use of reduction-in-force regulations. If the losing competitive area identifies and transfers more employees than the gaining competitive area needs to carry on the function, the gaining competitive area may follow reduction-in-force procedures to relieve the surplus. Competing employees identified by the losing competitive areas have a right to:

(a) transfer to the gaining competitive area before it conducts a reduction in force; and

(b) compete among themselves and employees in the gaining competitive area for retention under the OPM's reduction-in-force regulations.

351 F.P.M. § 5-3(d)(2).

There is no empirical evidence as to how often Congress shuts down an agency, transfers its functions to another agency, but requires the receiving agency to carry out the transferred functions with substantially fewer employees. It happened in this case and

(Cont'd)

"there has been no specific finding of an unjustified or unwarranted personnel action." (418a).

it is planned for the Interstate Commerce Commission.⁵ The important point is that the Office of Personnel Management believes the situation arises often enough to require regulation; and that regulation unequivocally guarantees transfer-identified employees the right to transfer prior to being separated through reduction in force.

II.

IF THE IMPROPER SEPARATIONS ARE NOT VOID AS TO EMPLOYEES WHO COULD HAVE BEEN PROPERLY SEPARATED, REMEDY CANNOT BE DENIED EXCEPT AS A RESULT OF CALCULATIONS COMPLYING WITH THE REDUCTION IN FORCE REGULATIONS.

The consolidated decisions said that remedy would be provided to those employees who would not have been separated had the agency carried out a reduction in force on October 1, 1981 (265a-266a). The subsequent decisions on individual cases, however, say that determination of that question is not based on a reconstruction of an actual reduction in force as of that date (31a-34a).

This holding that reduction in force regulations are irrelevant to employees' rights in reductions in force is wholly arbitrary. Neither the board nor the court gives even a hint of a reason for saying that the regulations should not be followed to determine who was injured by the original violation. On the contrary, the court's consolidated decision had gone into the details of the record

5. "Legislation will be proposed to abolish the Interstate Commerce Commission and to deregulate completely the interstate motor freight, freight forwards, buses and waters carriers by October 1, 1987. The enactment of this legislation would eliminate a major portion of the ICC's workload. The remaining activities would be transferred to the Departments of Justice and Transportation and the Federal Trade Commission." Budget of the United States Government, 1988—Appendix, I-Z47.

to show why the only reason ever given for not following the regulations (that the government had failed to maintain adequate personnel records) was invalid:

In directing this procedure, the Board rejected the Department's contention that the retention rights of individual employees who had not been appointed to positions with the Office of Community Services could not be determined. It stated:

We specifically reject the agency's contention that it is impossible to determine identification of the employee because of inaccurate position descriptions. . . .

[W]e conclude [these findings] are supported by substantial evidence. Ms. Olivari, a department classification specialist was the only witness who had reviewed the Community Services Administration records. . . . She . . . testified that the necessary information could be obtained through a procedure known as a "desk audit," and that one could "conduct a regular desk audit after an agency has been abolished."

(267a-268a).

Once it was found that proper reduction in force calculations could still be made,⁶ there was no possible justification for saying

6. Any doubt as to the correctness of the court's finding that records could be sufficiently corrected as to be used for making proper reduction in force calculations would be dispelled by the fact that in the cases of the Seattle and Boston petitioners exactly this occurred (197a-198a).

the petitioners should be properly treated as having been separated through reduction in force even though the calculations required by the procedures have never been made.

Whether read as holding that reduction in force regulations never need to be followed, or that violations may or may not be condoned without stated reasons by an appeals court, the decisions in these cases directly violate *United States v. Nixon*, 418 U.S. 683 (1974); *Morton v. Ruiz*, 415 U.S. 199 (1974); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); and *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

III.

THE COURT'S HOLDINGS UNDERCUT THE STABILITY OF FEDERAL PERSONNEL LAW AND WILL LEAVE THE COURTS IN THE GEOGRAPHICAL CIRCUITS NO BASIS FOR GRANTING OR DENYING PRELIMINARY ENFORCEMENT OF TRANSFER AND REDUCTION IN FORCE RIGHTS.

The practical effect of the Federal Circuit's decisions goes far beyond denying justice to a few dozen former federal employees. The holdings that illegal separations are not null and void, and that the Federal Circuit itself may grant the agencies discretion whether to follow regulations or not, will lead to an explosion of pre-transfer and pre-reduction in force litigation. As the District Court stressed in this very case, *Sampson v. Murray*, 415 U.S. 61 (1974), bars preliminary relief in most federal employee removal cases. *National Council of CSA Locals v. Schweiker*, 526 F. Supp. 861, 865-6 (D.D.C. 1981) (437a-438a, 442a). This is because a truly improper removal will lead only to a "temporary loss of income, ultimately to be recovered," 415 U.S. at 90, on appeal from the action; since the loss will be recovered, the harm

inflicted by the violation cannot be "irreparable," and therefore preliminary relief is not available, 415 U.S. at 90-2.

If *Vitarelli* is not applicable to separations in violation of the transfer of function regulations, neither is *Sampson*. District courts will be asked to issue preliminary mandatory injunctions forcing agencies to accept employees in transfer, rather than let them be separated as a result of their not being accepted in transfer. The courts will not be able to deny the relief on the ground that, assuming the transfer regulation has been violated, the injury is merely "temporary loss of income, ultimately to be recovered," 415 U.S. at 90. On the contrary, under the Federal Circuit doctrine challenged here, there can be no recovery of damages for transfer violations; the regulation must be enforced through prior judicial injunction or not at all. The Federal Circuit's holding that it has given the board "discretion" whether to follow the regulations in adjudicating reduction in force cases similarly makes it impossible for district courts to rely on *Sampson* as a bar to preliminary relief. An agency announces that it is going to reduce in force from 900 to 200 employees, but that it is going to use some procedure of its own device in lieu of the reduction in force regulations. Unless the employees obtain preliminary relief, they risk the Federal Circuit giving the MSPE the discretion to find that removals based on ad hoc procedures are valid. If the employees do seek preliminary relief, it cannot be denied on the ground that if the agency is violating the regulation the consequence is only "the temporary loss of income, ultimately to be recovered." 415 U.S. at 61.

In short, the Federal Circuit's repudiation of the usual rule of law, exemplified by *Vitarelli*, creates a serious risk of a litigation explosion, as federal employees seek preliminary court action to enforce their rights under regulations.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgments and opinions of the Court of Appeals for the Federal Circuit.

Respectfully submitted,

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*On Petition for Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit*

APPENDIX FOR PETITIONERS

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

RAYMOND C. AHLBERG,)	
et al.,)	Appeal Nos. 86 881
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PETITIONERS,)	86 892
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DEPARTMENT OF HEALTH)	86 947
AND HUMAN SERVICE)	
)	
RESPONDENT.)	

DECIDED: NOVEMBER 13, 1986

Before FRIEDMAN, Circuit Judge, COWEN,
Senior Circuit Judge, and NIES, Circuit Judge.
FRIEDMAN, Circuit Judge.

This case follows in the wake of our
decisions in Certain Former CSA Employees v.
Department of Health and Human Services, 762
F.2d 978 (Fed. Cir. 1985) (Former CSA
Employees), and Menoken v. Department of
Health and Human Services, 784 F.2d 365 (Fed.

Cir.), cert. denied, 55 U.S.L.W. 3257 (U.S. Oct. 14, 1986). In Former CSA Employees, we affirmed the decision of the Merit Systems Protection Board (Board) that (1) upheld a reduction in force resulting from the abolition of the Community Services Administration and the transfer of some of that agency's functions and employees to a new agency, the Office of Community Services (new agency), and (2) remanded the case to give former employees of the Community Services Administration the opportunity to show that they had greater rights to positions in the new agency than the employees who had been transferred to those positions. In Menoken we approved the Board's use of a master retention list to determine whether a particular former Community Services Administration employee was entitled to displace another such employee who had been transferred to the new agency.

In the present case, the Board held that the rights of the 28 petitioners, former Community Services Administration employees who had not been transferred to the new agency, had not been violated in the reduction in force. We affirm.

I

A. The background facts involved in this appeal are detailed in Former CSA Employees and summarized again in Menoken, and thus need not be repeated here. Briefly, the facts involved in this appeal are as follows:

The Community Services Administration, which administered the grants under the federal antipoverty programs made to State community agencies, was abolished on September 30, 1981. A new agency, the Office of Community Services, was established in the Department of Health and Human Services

(Department). In Former CSA Employees, we upheld the Board's findings that, with one exception not here relevant, all the functions of the Community Services Administration had been transferred to the new agency, and we recognized that the Department had conceded that "all the Community Services Administration employees were 'identified' with the transferred functions. 762 F.2d at 983.

When it was abolished, the Community Services Administration had more than 900 employees. the new agency, which had only 165 employees to perform the transferred functions, filled those positions with former Community Services Administration employees. Because the Community Services Administration had not maintained adequate personnel records, the Department "could not reconstruct exact reduction in force

priority registers for the Community Services Administration employees or determine the exact priorities among those employees for the new positions in the Office of Community Services." Id. at 981. Therefore, the Department created preference order master lists to determine which of the 900 former employees should be offered the 165 vacant positions in the new agency.

On the appeal of former Community Services Administration employees who had not been selected for positions in the new agency under this procedure, the Board held that although the Department had not followed traditional reduction in force procedures, it was not necessary to invalidate the entire reduction in force. According to the Board:

Where, as in this case, the ultimate question for resolution relates to the retention of

substantially fewer employees than were necessary prior to the transfer, the agency's noncompliance with certain provisions of part 351 does not warrant unconditional reversal of the entire reduction in force since many of those employees would have been subjected to separation from the Federal Service in any event.

Certain Former CSA Employees v.
Department of Health and Human Services,
21 M.S.P.R. 379, 393 (1984), aff'd,
Certain Former CSA Employees v. Department
of Health and Human Services, 762 F.2d 978
(Fed. Cir. 1985).

The Board remanded the individual appeals to its regional offices for proceedings to determine whether any non transferred employee was entitled to retention. The Board ordered that, in these remand processings, each former Community Services Administration employee should assert that he was identified with

a function that was transferred from the Community Services Administration to the new agency and then should "identify a position or positions for which he was qualified that have been assigned to other employees with less retention standing or positions occupied by employees who had no initial entitlement to transfer." Id. In affirming the Board's decision, we concluded that the "Board has devised an appropriate procedure to determine whether any of the employees of the former agency who were not employed at the latter agency should have been so employed because of their retention priorities." Former CSA Employees, 762 F.2d at 985.

Menoken was the first appeal to this court from the Board's remand proceedings to determine individual entitlement to positions at the new agency. In Menoken,

784 F.2d at 369 370, we approved the Board's use of the master retention lists to determine whether a particular former Community Services Administration employee was entitled to displace another such employee who had been transferred to the new agency.

B. This case involves two groups of petitioners: those formerly employed in the Community Services Administration offices in (1) Boston and (2) Atlanta and Kansas City. Since the facts and legal issues involving the two groups are different, we discuss each group separately.

II. The Boston Petitioners

A. In our decision in Former CSA Employees, 762 F.2d at 984, we held that the only issue on remand before the Board

should be the relative retention priorities of the employee claiming a particular position at the new agency and the employee appointed to this position. Moreover, we held that the burden rested upon the petitioners initially "to show that there was a position in the new agency 'assigned to [an]other [former Community Services Administration employee] with less retention standing ... or no initial entitlement to transfer.'"

Id.

In accordance with the Board's directive in Former CSA Employees, the Boston presiding official, in an August 14, 1984 order, directed each petitioner to provide a submission indicating:

[t]hat he was identified with a continuing function transferred to the Office of Community Services (OCS) [new agency] and

... further identify[ing] a position or positions for which he was qualified that have been assigned to other employees with less retention standing or positions occupied by employees who had [no] initial entitlement to transfer.

Moreover, the presiding official cautioned the petitioners that:

Absent such assertions, an appeal will be dismissed for failure to prosecute Where an appellant fails to provide the requested information, the record will close on September 14, 1984 and his appeal will be discussed with prejudice.

No submissions were made. Almost a year later, in a second order, dated July 22, 1985, the Boston presiding official directed the petitioners to file a full and complete response to the August 14, 1984 order, and admonished them that failure to file an adequate response would result in dismissal of their appeal with prejudice.

Despite the two orders, most of the Boston petitioners (the Ahlberg petitioners) filed no response. The presiding official dismissed their appeals for failure to prosecute, stating:

[E]ach appellant was given notice that the burden in this case had shifted to them to come forward with allegations of sufficient specificity to enable the agency to address the contested matters in its presentation to evidence and that failure to meet this burden would result in dismissal with prejudice for failure to prosecute.

The record reflects that none of the appellants ... provided the information requested in the July 22, 1985 order and did not respond to this order in any way. Consequently, I find that these appellants have failed to meet their burden of presenting specific exceptions to the agency's actions and have failed to prosecute their appeals. Accordingly, I must dismiss their appeals with prejudice. (footnote omitted).

The three other Boston petitioners (the Janey petitioners) filed responses. Betty Kaufman, who held a GS 14 position at the Community Services Administration, claimed entitlement to attorney examiner positions which were classified at the GS 15 level. Kenneth Janey and Hamed Negrón, who both held GS 12 positions at the Community Services Administration, claimed entitlement to an outplacement coordinator position which was classified at the GS 15 level.

The presiding official held that these three petitioners had not identified positions at the new agency for which they were qualified, since an employee is not entitled to a promotion as a result of a reduction in force. Menoken, 384 F.2d at 368.

Janey also claimed entitlement to a secretarial position at the new agency. The minimum qualification for this position was the ability to type 40 words per minute, and Janey could type only 20 words per minute. Because Janey was not qualified for the secretarial position, the presiding official found that he had failed to identify a position at the new agency for which he was qualified.

In a detailed order, the presiding official concluded that the responses of the Janey petitioners were inadequate to show entitlement to a position at the new agency. He further stated that if any of the information relating to the Janey petitioners was inaccurate and if any petitioner could "still assert facts sufficient to show entitlement to a position, then a hearing may still be

warranted," and that each petitioner could file a response. The Janey petitioners filed a short response. The presiding official dismissed their submissions, which he found insufficient to establish entitlement.

B. The sole ground upon which the Boston petitioners challenge the Board's decision is that they were improperly denied a hearing on the question whether they were entitled to a position in the new agency. They argue that under 5 U.S.C. § 7701(a)(1) (1982), which provides that in an appeal to the Board the appellant "shall have the right (1) to a hearing for which a transcript will be kept," and this court's decision in Crispin v. Department of Commerce, 732 F.2d 919 (Fed. Cir. 1984), they were

entitled to a hearing without regard to what evidence they proposed to introduce.

In the special circumstances of this case, however, in which the individual proceedings were conducted pursuant to the Board's specific direction in its remand order, we conclude that the presiding official properly denied a hearing because the Boston petitioners failed to show any possible entitlement to a position at the new agency. That, of course, was the issue upon which the Board in Former CSA Employees directed the individual remand proceedings.

1. As noted, the Board there directed that in the remand proceedings, each former employee was required to "identify a position or positions for which he was qualified that have been assigned to other employees with less

retention standing or positions occupied by employees who had no initial entitlement to transfer." We approved that standard in our Former CSA Employees decision. The order of the presiding official tracked this language and also repeated the additional requirement the Board specified in Former CSA Employees that the employee show that he was identified with a continuing function that was transferred to the new agency (a requirement we discuss in part II B 2 below).

Since the presiding official was faced with the likelihood of holding a substantial number of individual hearings, it was appropriate and reasonable for him to require the individual petitioners to make a threshold showing that they had a

colorable claim under the standards of Former CSA Employees. That was all his order required them to do.

The presiding official twice warned the Boston petitioners that if they failed to file a submission containing such a prima facie showing of entitlement, their cases would be dismissed for nonprosecution. When the Ahlberg petitioners failed to file any response, the presiding official dismissed their cases. That action was justified and proper.

As we have recognized (Crispin, 732 F.2d at 922 23), a Board regulation explicitly authorizes the presiding official to dismiss an appeal for failure to prosecute. 5 C.F.R. § 1201.43(b) (1985) provides:

If a party fails to prosecute or defend an appeal, the presiding official may dismiss the action with prejudice or rule for the appellant.

The presiding official correctly treated the Ahlberg petitioners' failure to make any submission, after twice being told to do so, as a failure to prosecute their appeal, as he had warned them he would do. The regulation explicitly authorized him to dismiss the cases for such failure. The regulation also shows that, contrary to the petitioners' contention, an employee does not have an absolute right to a hearing before the Board under 5 U.S.C. § 7701(a)(1) without regard to the employee's actions before the Board.

The Ahlberg petitioners' failure to make the submissions the presiding official required also may be viewed as a

waiver of any right they may have had to a hearing. An employee may waive his right to a hearing under 5 U.S.C. § 7701(a)(1). See, e.g., Manning v. Merit Systems Protection Board, 742 F.2d 1424, 1427 28 (Fed. Cir. 1984) (evidentiary hearing before the Board on jurisdictional issues is not required where an employee submits no evidence in response to the agency's documentation evidence); Hulett v. Department of Navy, 27 M.S.P.R. 510, 512 (1985) (right to hearing waived where an employee twice indicated that he declined a hearing despite notice that failure to make a timely request for a hearing would result in a waiver of right to hearing); Brown v. Department of Navy, 21 M.S.P.R. 204, 205 06 (1984) (employee's failure to act timely to preserve his statutory

hearing right constituted an implied waiver of that right).

Here the petitioners were on notice that failure to make the required submissions would result in the closing of the record and dismissing of the appeal. When, despite such notice, the petitioners failed to make any submissions, implicitly they waived any right they may have had to a hearing.

2. The Ahlberg petitioners contend that they were justified in disregarding the presiding official's orders to identify a position at the new agency to which they were entitled because they were improperly directed to make "futile" submissions. As noted previously, the submission was required to indicate that the former Community Services Administration employee was identified

with a continuing function that was transferred to the new agency. According to the petitioners, such a submission would have been futile because in Former CSA Employees, 762 F.2d at 983, this court upheld the Board's findings that all of the functions of the Community Services Administration had been transferred to the new agency, and had held that the Department had conceded that "all the Community Services Administration employees were 'identified' with" the transferred functions.

Although we recognized in Former CSA Employees, 762 F.2d at 984, that all Community Services Administration employees were identified with functions that had been transferred to the new agency, we did not hold that all Community

Services Administration functions were transferred to the new agency or that each Community Services employee was identified with every function that was transferred. Accordingly, it was proper for the presiding officer to require the petitioners to indicate the particular transferred positions with which they had been identified.

In any event, if this requirement was unnecessary, the petitioners' response could have so indicated. The alleged futility of this requirement could not and did not justify the petitioners' failure to comply with the other requirement that they identify a position in the new agency to which they had a greater entitlement than the incumbent. Indeed, the three Janey petitioners so recognized, since they made submissions that attempted to

show entitlement to particular positions at the new agency. See part II B 3 below.

3. The presiding official also properly dismissed without a hearing the cases of the three Janey petitioners who made submissions, because their submissions failed to identify any positions in the new agency for which they were qualified.

All three of the Janey petitioners asserted they were qualified for positions at a higher grade than they had at the Community Services Administration. We held in Menoken, however, that an employee is not entitled to obtain a higher grade position through a reduction in force; we stated that "it would be anomalous if, as a result of a reduction in force, an employee who initially was removed could

use flaws in the reduction in force to obtain a higher grade than the one he had held." 784 F.2d at 368. To the extent the Janey petitioners were challenging the classifications of their old positions or the positions at the new agency to which they claimed entitlement, that was not a proper consideration in the Board's review of the reduction in force. Id. at 368 69.

One of the three Janey petitioners also claimed entitlement to a secretarial position at the new agency. A qualification for that position was the ability to type 40 words per minute. Janey failed to respond to the agency's evidence showing that the petitioner could type only 20 words per minute. Thus, the presiding official correctly concluded that that employee had not shown any

possible basis for entitlement to that position.

4. Before this court the petitioners have never stated what evidence of their entitlement to positions at the new agency they would have introduced at a hearing that they could not have described in the submissions the presiding official directed them to make. Instead, in response to questions at oral argument, the petitioners' counsel indicated only that they wanted a hearing to introduce evidence that they would have been entitled to prevail if the new agency had proceeded by reconstructing traditional reduction in force registers rather than using the master lists. As we discuss in part III, the new agency was justified in using the master lists to determine the relative priority of the former Community

Services Administration employees who were not transferred to the new agency and those who were. The conclusion thus is inescapable that the petitioners had no relevant evidence on the issues before the Board that they were precluded from bringing to the attention of the presiding official as a result of the lack of a hearing.

5. The petitioners contend that our decision in Crispin, supra, establishes that any employee who appeals from an adverse personnel action is entitled to an evidentiary hearing before the Board, without regard to the evidence he proposes to introduce at that hearing. Crispin does not have the sweeping reach that petitioners ascribe to it. To the contrary, the holding there that the Board

erroneously denied Ms. Crispin a hearing turned upon the particular facts and cannot properly be extended to the significantly different circumstances in the present case.

Ms. Crispin was downgraded in a reassignment pursuant to an agency wide reduction in force. In her appeal to the Board, she contended that her competitive level was improper. The presiding official ruled that the propriety of the competitive level was a question of law and directed the parties to file briefs on that issue. Ms. Crispin did so, and three days later requested a hearing on the issue. The presiding official denied without explanation the request for a hearing and upheld Ms. Crispin's reassignment, ruling that no error in the competitive levels had been shown.

This court held that the presiding official improperly had denied Ms. Crispin a hearing. It viewed the presiding official's action in doing so as, in essence, granting summary judgment for the government, and ruled that the Board cannot grant summary judgment. The court rejected the government's contention that the presiding official denied a hearing as a sanction for Ms. Crispin's refusal to respond to discovery or to her orders. Noting that Ms. Crispin "did not fail to comply with the presiding official's orders concerning the competitive level issue," 732 F.2d at 923, the court concluded that the presiding official had not imposed sanctions.

Crispin is distinguishable from the present case in a number of respects.

First, the presiding official there was not implementing a prior Board decision that had explicitly specified the showing the individual employees were required to make in order to prevail, but was instead hearing an initial appeal from the agency action. Second, the court in Crispin held that the presiding official had not imposed sanctions. Here, however, we have held that the dismissal of the Ahlberg cases was a sanction for failure to make any response to the presiding official's submission orders. Third, unlike Ms. Crispin, the Ahlberg petitioners did "fail to comply with the presiding official's orders." Fourth, Ms. Crispin specifically requested a hearing, which the presiding official denied without explanation. In the present case, in contrast, the presiding official indicated the reasons

for his dismissal of the cases without a hearing. Fifth, the Boston petitioners were warned twice that their failure to satisfy the requirements of the presiding official's submission orders would result in the dismissal of their cases. In contrast, Ms. Crispin had never been told that, despite her request for a hearing on the competitive level issue, the presiding official would decide that issue on the basis of the briefs.

In sum, Crispin involved a quite different situation, and we decline to extend its holding to the present case.

III. The Atlanta and Kansas City Petitioners

A. After hearings, the presiding officials found that none of the Atlanta or Kansas City petitioners had established

that there were positions in the new agency for which they were qualified and for which they had higher retention rights than the employees who had been transferred to the identified positions. The presiding officials therefore upheld the removal of these petitioners pursuant to the reduction in force.

B. The sole contention of these petitioners is that the Board was required to recreate standard reduction in force registers to determine their retention rights. According to these petitiones, the Board improperly used the master retention lists to determine individual entitlement to positions at the new agency.

We specifically rejected that contention in Menoken, which controls here. There we stated:

Underlying much of the petitioner's argument is the contention that the Board was barred from any reliance upon the master retention lists in determining whether a particular former Community Services Administration employee was entitled to displace another such employee who had been transferred to the new agency
....

Although neither the Board nor this court explicitly addressed the use of the master list, approval of that use was implicit in the decisions. Our decision noted that the master lists "establishing priority retention rankings for all the former Community Services Administration employees ... did not satisfy the requirements of traditional reduction in force registers" 762 F.2d at 984. We nevertheless upheld the Board's handling of the case under the remand procedure it devised "to determine whether any of the employees of the former agency who were not employed at the latter agency should have been so employed because of their retention priorities: as "a reasonable method of dealing with perhaps a unique and certainly most

unusual situation." Id. at 985.

In so holding, we did not intend to require the Board to reconstruct "traditional reduction in force registers." Instead, we intended to, and did, give the Board considerable discretion in determining the bases upon which it would ascertain whether particular former Community Services Administration employees had a higher right to a position in the new agency than the employee the new agency had appointed. We cannot say the Board abused its discretion in the method it used in deciding that question in this case adversely to the petitioner.

784 F.2d at 369 70.

In Menoken, we made clear that the Board could use the master retention lists on remand to determine individual entitlement to positions at the new agency. Contrary to the petitioners' contention, this statement was not dictum, but the basis for our disposition of the

case. Menoken does not limit the Board's use of the master retention lists to exceptional situations, as the petitioners assert.

The petitioners contend that Menoken was erroneously decided because it is inconsistent with Former CSA Employees and urge the panel to recommend that the court consider this case in banc to overrule Menoken. Contrary to the petitioners' contention, Menoken merely made explicit what was implicit in Former CSA Employees, and is fully consistent with it. Accordingly, we reject the petitioners' suggestion that the panel recommend that the court hear this case in banc.

IV.

The government contends that this appeal is frivolous, and requests that we

assess attorney's fees and costs against the petitioners and their counsel. Although we have rejected the petitioners' contentions, we cannot say that those contentions are so insubstantial as to warrant the imposition of sanctions.

CONCLUSION

The orders of the Board upholding the application of the reduction in force to the petitioners is affirmed.

AFFIRMED

Note: This Order will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

_____)	
FLOYE SUMIDA,)	
)	
Petitioner,)	
)	
v.	)	Appeal No.
	)	86-1336
DEPARTMENT OF HEALTH AND)	
HUMAN SERVICES,)	
)	
Respondent.)	
_____)	

Before MARKEY, Chief Judge, NIES and
ARCHER, Circuit Judges.

ORDER

Petitioner Floye Sumida in her Statement In Lieu of Brief states that she does not object to summary affirmance of the

decision of the Merit Systems Protection Board (MSPB). Petitioner states that the controlling issues have been decided in earlier cases and that the purpose of this appeal is to preserve her right to seek review of her claim by the Supreme Court. Respondent Department of Health and Human Services has no objection to the court summarily affirming the decision of the MSPB in this case.

Accordingly,

IT IS ORDERED THAT;

The decision of the MSPB is summarily affirmed.

FOR THE COURT

Date

Howard T. Market
Chief Judge

cc: Phillip R. Kete, Esq.
Linda T. Maramba, Esq.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS REGIONAL OFFICE

DOROTHY HAYES, et al. <u>1/</u>)	
)	
Appellants	)	CASE NUMBER:
	)	SL03518210144 REM
)	
v.	)	DECIDED ON:
	)	AUGUST 12, 1985
)	
DEPARTMENT OF HEALTH AND	)	<u>T. Christopher</u>
HUMAN SERVICES	)	<u>Heavrin</u>
	)	Presiding Official
Agency)	
)	

INTRODUCTION

The appellants appealed their separations from various positions through reduction-in-force (RIF) procedures in the Kansas City, Missouri, office of the Community Services Administration (CSA),

1/ The members of this consolidated appeal are listed in Appendix A attached to this initial decision.

effective September 30, 1981. The RIF occurred as the result of the abolishment of CSA on October 1, 1981. As employees who were affected by a reduction in force, the appellants are entitled to appeal their separations to the U.S. Merit Systems Protection Board (the Board). 5 C.F.R. 351.901 (1981).2/

For the reasons set forth below, the CSA's actions separating the appellants are AFFIRMED.

2/ The issuance of the initial decisions on these appeals was held in abeyance pending the Federal Circuit Court of Appeals decision in Certain Former CSA Employees v. Department of Health and Human Services, 762 F.2d 978 (Fed. Cir. 1985).

ANALYSIS AND FINDINGS

On appeal, the appellants argue that a transfer of function occurred when their agency was abolished and some of CSA's former work was directed to be accomplished by a new entity in the Department of Health and Human Services (HHS). They contend that their substantive RIF rights were ignored in the process of filling the positions of the transferred functions. Consequently, they argue that their removals must be reversed.

The undisputed evidence of record shows that following the demise of CSA, HHS established an Office of Community Services (OSC) within its organization in order to administer grants previously made to grantees by CSA. Numerous employees of the former CSA joined together and sought to contest their separations through the

courts and before the Board. They requested that an injunction be issued to prevent HHS from filling new positions by non-former CSA employees. The court order 3/ which ensued required that HHS follow retention preference in filling positions and the former employees were allowed to submit late appeals concerning their separations to the Board. Following the receipt of myriad appeals, the Board's Chief Administrative Law Judge consolidated several hundred cases, held a hearing on common issues of law and fact of national scope and issued a partial initial decision on August 20, 1983.4/

3/ National Counsel of CSA Locals, American Federation of Government Employees (AFGE) AFL v. Schweiker, 526 F. Supp. 861 (D.D.C. 1981).

4/ The Partial Initial Decision was issued under MSPB Docket No. HQ12008110063.

On June 18, 1984, the Board issued its decision on the parties' petitions for review of the ALJ's ruling. The Board found that five functions previously performed by CSA transferred to OCS when the latter was designated to assume operation of the transferred activities.^{5/} Further, the Board found that HHS failed to identify positions of competing employees with the transferring functions. However, rather than invalidate the entire reduction in force, the Board determined that because relatively few positions were

^{5/} See Certain Former Community Services Administration Employees v. Department of Health and Human Services, 23 M.S.P.R. 379 (1984).

in OCS, when it was established,6/ most of the former CSA employees would not have been retained if proper reduction-in-force regulations had been applied to the transfer of function, and that the proper remedy was to permit individual appellants to show the violations, if any, of their substantive rights.7/

6/ The number of positions in OSC continued to decrease while these appeals were pending before the Board. The seven positions in OCS in Kansas City were all liquidated by September 30, 1983. See Ag. Ex. 1.

7/ The Board decided that an appellant had to assert that he was identified with a continuing function at the time OCS was established and that he/she must identify a position or positions for which he/she was qualified that were assigned to other employees with less retention standing or positions occupied by employees who had no initial entitlement to transfer. See Jackson v. National Transportation Safety Board, 18 M.S.P.R. 626 (1984).

Accordingly, when the undersigned residing official scheduled a hearing for the appellants in this consolidation, an order was issued advising the appellants of the requirement imposed on them to specify alleged infringements of their rights. Consolidated Remand Appeal File, Tabs 4, 6, 11.

Appellant Hayes, Firoved, Thurston, Dickerson, Kampschroeder, Lillis, and Wakefield did not respond to the above over and did not appear at the hearing to present testimony. However, because the administration of grants in the close-out function was a clearly identifiable segment of the agency's mission, I find that these appellants were identified with a continuing function at the time OCS was established. The above appellants, however, did not identify positions, for

which they claim they were qualified, that were assigned to other employees with less retention standing, or positions occupied by employees who had no initial entitlement to transfer. The agency presented the testimony of Thomas King, former personnel officer of OCS, in which he stated that the selection of employees to fill the new positions in OCS was in accordance with the individuals' qualifications and the preference order based on relative standing on the master retention list. Tr. 16-17. In addition, it is undisputed that all of the above appellants had less retention standing than the employees who were selected for the positions in OCS. Ag. Ex. 1; Consolidated Remand Appeal File, Tab 16, Ex. 5 Based on the undisputed evidence

presented by the agency, I find that the above appellants' transfer of function rights under RIF regulations were not violated.8/

Appellant Celestine likewise did not attend the hearing, but he asserted correctly that he had higher retention standing than any of the employees retained. Id. However, he neither asserted nor presented evidence tending to show that he was qualified for any of the positions filled. Being identified with the transferred "closeout" function, he was entitled to compete for retention.

8/ The Board has held where, as in this case, the gaining agency determines that there will be a surplus of employees, the losing agency may act as agent for the gaining agency in separating those employees who unsuccessfully compete for retention at the gaining agency. See Smith v. Department of Commerce, 19 M.S.P.R. 589 (1984).

The retention register discloses that appellant Celestine's position with CSA was that of Supervisory General Supply Specialist at the GS-12 level. Id. Appellant Celestine, like all other employees, is not entitled to a promotion during a RIF. 5 C.F.R. 351.704(b). As only two positions, Systems Accountant, GS-12, and Secretary (Typing), GS-7, were at or below appellant's grade level, he could be retained in these positions only if qualified for them. The agency adduced testimony from Mr. King that the positions were filled according to retention order by those qualified for them. Tr. 16-17. Appellant Celestine did not present evidence to rebut the agency's proof. Accordingly, I find that appellant Celestine's transfer of function rights were not denied.

Appellant Brown testified at the hearing that he was qualified for the GM-15 Regional OCS Program Manager position which was filled by Leroy Vokins, who had less retention standing than Brown. In CSA, Mr. Vokins was Chief, Program Management Supply Division, a GS-15 position. Appellant Brown occupied a Supervisory Community Action Program Field Representative position at the GS-14 level. The Regional OCS Program Manager was established at the GM-15 grade level after the abolition of CSA. Although appellant Brown may be more qualified for the Program Manager position than Mr. Vokins, I find that under pertinent regulations, he is not entitled to a promotion in a reduction force. 5 C.F.R. 351.704(b). Moreover, Mr. Vokins was

properly identified with the transferring function and, therefore, was entitled to compete for a position with OCS. Because he was the only grade 15 employee with CSA in Kansas City, Mr. Vokins was entitled to the GM-15 Program Manager position. With respect to questions challenging Vokins' qualifications, I note that the Board has held that under 5 C.F.R. 351.702 the qualification requirements for a position may be waived if the employee being assigned due to a RIF meets the minimum education requirements of a position and the agency determines that the employee has the capacity and ability to perform satisfactorily. Lorenz v. Department of the Interior, 10 MSPB 775, 776 (1982). Accordingly, based on the foregoing analysis, I find that appellant Brown has

not demonstrated that his rights were violated by the retention of Mr. Vokins.

Appellant Brown also contends that he should have been selected to fill a Field Representative position over either William Salisbury or James Gilberth. Although conceding that Messrs. Salisbury and Gilberth had higher retention standing than he did and that they were qualified for the GS-14 and GS-13 positions that they filled, he argued that they were less qualified for the positions than he was. He implied that the duties of two individuals performed in their positions at the time CSA was abolished were not grant administration duties and, therefore, that they were not entitled to be transferred. Mr. King testified that the program analysis, planning and evaluation duties performed by Mr.

Salisbury in his former GS-14 Program Analysis Officer position, were included in the position descriptions for the Field Representative position in OCS. Tr. 46; Consolidated Remand Appeal File, Tab 16, Exs. 4 and 7. He further stated that equal opportunity responsibilities performed by James Gilberth in his GS-13 Equal Opportunity Officer position, were also transferred to OCS. Tr. 40. He noted that the position description for the Regional OCS Program Manager required him to ensure conformance of grantees with the provisions of equal opportunity. Consolidated Remand Appeal File, Tab 16, Ex. 3. Appellant Brown did not dispute the agency's evidence presented on this issue. Tr. 38, 40. In light of the evidence presented by the agency, I find that

employees Salisbury and Gilberth were entitled to transfer with the close-out function to OCS. As they were qualified for Field Representative positions and had higher retention standing than appellant Brown, I find that he has failed to demonstrate that his transfer of function rights were violated.

In sum, I have found that the agency has presented evidence sufficient to sustain the denials of retention for all appellants in this consolidation.

DECISION

The appellant's separations under RIF procedures by CSA are hereby AFFIRMED. The Department of Health and Human Services did not violate appellants' rights by failing to select them for

positions in the Office of Community Services.

APPEAL RIGHTS

This is an initial decision of the Merit Systems Protection Board. Any party or the Office of Personnel Management may seek to have it reviewed by the Board by filing a petition for review with:

Office of the Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. 1201.114 - .115. The petition for review must be filed on or before September 16, 1985, and must set forth objections to the initial decision, supported by references to applicable laws, regulations and the record. Parties should note that, pursuant to recent amendments effective August 1, 1985, they are now required to

serve any petition for review and any subsequent pleadings on all other parties. A copy of these important amendments is attached to this decision. For additional information see 50 Fed. Reg. 28895. If a petition for review is filed, an informational copy of it should be forwarded to the St. Louis Regional Office.

This initial decision will become a final decision of the Board on September 16, 1985, unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. 1201.113 and 117.

The appellant is hereby notified of the right under 5 U.S.C. 7703 to seek judicial review, if the Court has jurisdiction, of the Board's action by

filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the Court no later than thirty (30) days after the initial decision becomes final.

For the Board:

T. Christopher Heavrin
Presiding Official

APPENDIX A

HAYES, Dorothy M.	SL03518210144 REM
FIROVED, Sherry	SL03518210155 REM
THURSTON, Gerald F.	SL03518210154 REM.
WAKEFIELD, Donald L.	SL03518210128 REM
BROWN, James G.	SL03518210129 REM
CELESTINE, Isaiah C.	SL03518210133 REM
DICKERSON, June A.	SL03518210147 REM
KAMPSCHROEDER, Ruth A.	SL03518210135 REM
LILLIS, Lawrence P.	SL03518210186 REM

INITIAL DECISION

1/ The Community Services Administration was superseded by the Office of Community Services (OCS) within the Department of Health and Human Services effective October 1, 1981. jurisdiction over this appeal. 5 U.S.C.

§§ 1205(a)(1); 7701(a); 5 C.F.R. §§ 351.901 and .202(a)(1). For the reasons set forth below, the action of the agency is AFFIRMED.

The basic facts relating to the demise of the Community Services Administration have been set forth in Certain Former CSA Employees v. Department of Health and Human Services, 21 M.S.P.R. 379 (1984) & Certain Former CSA Employees v. Department of Health & Human Services, 762 F.2d 978 (Fed. Cir. 1985) and need not be repeated here.

On June 18, 1984, the Board issued an Opinion and Order, Certain Former CSA Employees, 21 M.S.P.R. at 394, which, among other things, remanded this appeal to the Atlanta Regional Office in order to afford appellant an opportunity to present

evidence which would tend to establish that she was denied retention to which he was otherwise entitled under 5 C.F.R. § 351.303. The findings and conclusions in the Board's Opinion and Order, including the remand, were affirmed in Certain Former CSA Employees, 762 F.2d at 985.

By Order dated July 16, 1984, appellant was directed to file certain documentation with the Atlanta Regional Office, in accordance with the Board's Order, no later than August 15, 1984. Appellant responded alleging among other things that she was identified with several positions that had transferred to OCS on September 30, 1981. On September 14, 1984, before further action could be taken at the regional office level, the United States Circuit Court of Appeals for the Federal Circuit issued an Order which

stayed the administrative processing of all CSA appeals pending a ruling by the Court. The Stay Order was lifted when it issued its decision in Certain Former CSA Employees, 762 F.2d 978. Administrative processing of the appeals commenced again on July 17, 1985.

By subsequent Order dated July 24, 1985, appellant was again directed to file specific documentation with the Atlantic Regional Office identifying the position or positions which she was identified with in CSA that transferred to OCS, as of September 30, 1981. The appellant made a timely response to this subsequent Order. The purpose for the above referenced Orders is to provide for the orderly adjudication of the numerous appeals filed with the Board as a result of the 1981 CSA

reduction in force. Cf. Abbott v. Department of Commerce, 18 M.S.P.R. 429, 431 (1983).

At the time of filing her appeal, appellant requested a hearing and one was held in Atlanta, Georgia, September 23 through 25, 1985. The record was closed on October 7, 1985, after allowing for the submission of written closing arguments from the parties. The record of that hearing and the submissions of the parties have been carefully considered in rendering a decision in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The record reflects that at the time of the RIF appellant was a Community Action Program Field Representative, GS-12. The appellant asserts that her function was transferred to OCS and the

agency has stipulated to this fact. The appellant also asserted that she was qualified for the GS-13 Community Action Program Field Representative temporary position in the Transition Function which, as the evidence disclosed, had been given to an individual who was not a former CSA employee. Appellant also claims entitlement to a second Secretary (Typing) GS-6 position in the Transition Function. The agency did not dispute this assertion nor did it present any evidence to refute it. The appellant then argues that under 5 C.F.R. § 351.302(a) and (c), she was entitled to transfer with her function without any change in grade or pay. The appellant's argument is not supported by either statute or regulation. The appellant's assertion is apparently based upon the provision in 5 C.F.R. § 351.303

(a) which provides that an employee must transfer without change in the "tenure" of her employment. The term tenure, however, is not synonymous with either the term "grade" or the term "pay." Tenure is the period of time an employee may reasonably expect to serve under her current appointment. Tenure is granted and governed by the type of appointment under which an employee serves. 5 C.F.R. § 210.102. The appellant further argues that the agency cannot transfer her to a lower graded position, nor separate her because she was entitled to transfer with her function and he contends that the agency is circumventing her rights by conducting a "mythical" reduction in force.

Appellant has not shown nor have I found anything in the law or in the implementing regulations which requires that an employee must be transferred before any reduction in force is conducted by the gaining agency. This does not mean, however, that the employee must actually be transferred either physically or on paper. See Federal Personnel Manual, Chapter 351-5. The right to transfer insures a right to compete for retention in such positions as may be established in the gaining competitive area. Competition is among employees of the gaining, not the losing, competitive area. Since OCS was established as a new office, it had no employees and it was filling its positions with former CSA employees through the use of a Preference

Order Master List.2/ The Office of Personnel Management has stated in the Federal Personnel Manual that an employee need not be transferred in fact or on paper if more employees are identified for transfer than the gaining agency will be able to accommodate. This was the case in the transfer of former CSA employees to OCS. CSA, however, was unable to act as the agent of OCS. See Federal Personnel Manual, Chapter 351, Subchapter 5-3. CSA had already been abolished before the Department of Health and Human Services took any action to effect a transfer of function. Therefore, the transfer had to be accomplished retroactively. The

2/ All former full-time, permanent, CSA employees with rights to compete for positions in the OCS office in Atlanta, Georgia were listed in tenure group and service computation date order.

Department of Health and Human Services essentially canceled the RIF action and effected retroactive corrective action in those cases where it found an employee would have been entitled to retention. The competition was only among former CSA employees. The Board's Order, referred to above, found no reversible error per se in the fact that numerous employees were "transferred" to lower graded positions at OCS or were separated.

Regarding the positions identified by the appellant as ones for which she qualified, none were given to employees with less retention standing. Another group of five positions, which the appellant contends were not filled by employees whose functions transferred or were as qualified as she, were all temporary positions. The agency presented

testimony that it had not been required to fill these temporary positions in retention order, but attempted to some extent to do so.

Those temporary positions which were established for the Transition Function were reconsidered by the agency since the Board found this function transferred. Employees of the agency personnel office reviewed the existing records and determined who would have been entitled to these positions had they been considered permanent. Under this exercise, the last person on the master list to be entitled to a position would have been employee number 18. Appellant was listed as number 26.

As to the filling of the above referenced temporary positions, there was

also testimony from the agency witness that the contemporaneous notes of the individual in the OCS personnel office that contacted employees for the "call back" reflected that appellant had been contacted concerning a Secretary (Typing) position in the Transition Function. Appellant denies that she was ever offered a position in the Atlanta OCS office. Appellant contends that the only offer she received was for a position in Washington, D.C. and that she could not accept that position. I find, however, that there is ample support in the record to rely upon the contemporaneous notes, as opposed to the appellant's nearly four year old recollection. I further find that there is no essential conflict in the ultimate result. Appellant declined an offer, regardless of where the position was

located and the agency subsequently determined, for one reason or another, that the position was not needed in the Atlanta office. There is no error in the agency making this decision, as it has a right to determine the makeup of its work force.

The record also discloses that there were at least three higher standing employees who also did not get offers of reemployment who are appellants. I find that these employees would have entitlement over appellant for any positions available for which appellant qualified. Accordingly, I find that any error by the agency in its original staffing of the transition function positions did not in any way infringe upon any RIF right of the appellant. I further

find that the agency has not improperly denied the appellant any retention.

DECISION

The reduction-in-force action affecting the appellant is hereby AFFIRMED.

NOTICE

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on December 6, 1985 unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§ 120.113, .117. Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel, may seek to have it reviewed by the Board by filing a petition for review with the:

Office of Clerk
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. § 1201.114 of the Board's regulations. (It is not necessary to serve the Regional Office). The parties should note that, pursuant to recent amendments effective August 1, 1985, they are now required to serve any petition for review and any subsequent pleadings on all other parties. For additional information see 50 Fed. Reg. 28895 (July 27, 1985) (to be codified at 5 C.F.R. § 1201.114). The petition for review must set forth objections to the initial decision, supported by references to applicable laws, regulations, and the record.

Any appellant adversely affected or aggrieved by the Board's final decision

may obtain judicial review, if the court has jurisdiction, by filing a petition with:

The U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20493

Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the court within 30 days of the final Board decision. 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

ROSCOE E. LONG
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

BETTY M. HUNTER,)	
Appellant,	)	DOCKET NUMBER
	)	AT03518210308-1
)	
v.	)	Date: Nov. 18, 1985
)	
DEPARTMENT OF HEALTH)	
AND HUMAN SERVICES,)	
Agency.	)	<u>ROSCOE E. LONG</u>
	)	Presiding Official

ERRATA TO INITIAL DECISION

In issuing the October 31, 1985 initial decision in the above styled cause, the first full paragraph on page 3 should have read as follows:

Appellant has not shown nor have I found anything in the law or in the implementing regulations which requires that an employee identified with a transferring function be transferred without any change in title, series, and

grade. The identified employee must be transferred before any reduction in force is conducted by the gaining agency. This does not mean, however, that the employee must actually be transferred either physically or on paper. See federal Personnel Manual, Chapter 351-5. The right to transfer insures a right to compete for retention in such positions as may be established in the gaining competitive area. Competition is among employees of the gaining, not the losing, competitive area. Since OCS was established as a new office, it had no employees and it was filling its positions with former CSA employees through the use of a Preference

Order Master List.1/ The Office of Personnel Management has stated in the Federal Personnel Manual that an employee need not be transferred in fact or on paper if more employees are identified for transfer than the gaining agency will be able to accommodate. This was the case in the transfer of former CSA employees to OCS. CSA, however, was unable to act as the agent of OCS. See Federal Personnel Manual, Chapter 351, Subchapter 5-3. CSA had already been abolished before the Department of Health and Human Services took any action to effect a transfer of function. Therefore, the transfer had to be accomplished retroactively. The

1/ All former full-time, permanent, CSA employees with rights to compete for positions in the OCS office in Atlanta, Georgia, were listed in tenure group and service computation date order.

Department of Health and Human Services essentially canceled the RIF action and effected retroactive corrective action in those cases where it found an employee would have been entitled to retention. The competition was only among former CSA employees. The Board's Order, referred to above, found no reversible error per se in the fact that numerous employees were "transferred" to lower graded positions at OCS or were separated.

For the Board:

ROSCOE E. LONG
Presiding Official

UNITED STATES OF AMERICA
 MERIT SYSTEMS PROTECTION BOARD
 ATLANTA REGIONAL OFFICE

SANDRA N. STOWERS, Appellant,	)	DOCKET NUMBER
v.	)	AT03518210195-1
DEPARTMENT OF HEALTH AND HUMAN SERVICES, Agency.	)	Date: Oct. 31, 1985
	)	ROSCOE E. LONG
	)	Presiding Official

INITIAL DECISION

Appellant filed a timely appeal with the Board's Atlanta Regional Office from the action of the Community's Services Administration (CSA) separating her through reduction in force effective September 30, 1981.1/ The Board has jurisdiction over this appeal. 5 U.S.C. §§ 1205(a)(1); 7701(a); 5 C.F.R. §§ 351.901 and .202(a)(1). For the reasons

set forth below, the action of the agency is AFFIRMED.

The basic facts relating to the demise of the Community Services Administration have been set forth in Certain Former CSA Employees v. Department of Health and Human Services, 21 M.S.P.R. 379 (1984) and Certain Former CSA Employees v. Department of Health and Human Services, 762 F.2d 978 (Fed. Cir. 1985) and need not be repeated here.

On June 18, 1984, the Board issued an Opinion and Order, Certain Former CSA Employees, 21 M.S.P.R. at 394, which, among other things, remanded this appeal to the Atlanta Regional Office in order to

1/ The Community Services Administration was superseded by the Office of Community Services (OCS) within the Department of Health and Human Services effective October 1, 1981.

afford appellant an opportunity to present evidence which would tend to establish that she was denied retention to which he was otherwise entitled under 5 C.F.R. § 351.303. The findings and conclusions in the Board's Opinion and Order, including the remand, were affirmed in Certain Former CSA Employees, 762 F.2d at 985.

By Order dated July 16, 1984, appellant was directed to file certain documentation with the Atlanta Regional Office, in accordance with the Board's Order, no later than August 15, 1984. Appellants responded alleging among other things that she was identified with several positions that had transferred to OCS on September 30, 1981. On September 14, 1984, before further action could be taken at the regional office level, the

United States Circuit Court of Appeals for the Federal Circuit issued an Order which stayed the administrative processing of all CSA appeals pending a ruling by the Court. The Stay Order was lifted when it issued its decision in Certain Former CSA Employees, 762 F.2d 978. Administrative processing of the appeals commenced again on July 17, 1985.

By subsequent Order dated July 24, 1985, appellant was again directed to file specific documentation with the Atlanta Regional Office identifying the position or positions which she was identified with in CSA that transferred to OCS, as of September 30, 1981. The appellant made a timely response to this subsequent Order. The purpose for the above referenced Orders is to provide for the orderly

adjudication of the numerous appeals filed with the Board as a result of the 1981 CSA reduction in force. Cf. Abbott v. Department of Commerce, 18 M.S.P.R. 429, 431 (1983).

At the time of filing her appeal, appellant requested a hearing and one was held in Atlanta, Georgia, September 23 through 25, 1985. The record was closed on October 7, 1985, after allowing for the submission of written closing arguments from the parties. The record of that hearing and the submissions of the parties have been carefully considered in rendering a decision in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The record reflects that at the time of the RIF appellant was a Community Action Program Field Representative, GS-

12. The appellant asserts that her function was transferred to OCS and the agency has stipulated to this fact. The appellant also asserted that she was qualified for the GS-13 Community Action Program Field Representative temporary position in the Transition Function which, as the evidence disclosed, had been given to an individual who was not a former CSA employee. The agency did not dispute this assertion nor did it present any evidence to refute it. The appellant then argues that under 5 C.F.R. § 351.302(a) and (c), she was entitled to transfer with her function without any change in grade or pay. The appellant's argument is not supported by either statute or regulation. The appellant's assertion is apparently based upon the provision in 5 C.F.R. § 351.303(a) which provides that an employee

must transfer without change in the "tenure" of her employment. The term tenure, however, is not synonymous with either the term "grade" or the term "pay." Tenure is the period of time an employee may reasonably expect to serve under her current appointment. Tenure is granted and governed by the type of appointment under which an employee serves. 5 C.F.R. § 210.102. The appellant further argues that the agency cannot transfer her to a lower graded position, nor separate her because she was entitled to transfer with her function and he contends that the agency is circumventing her rights by conducting a "mythical" reduction in force.

Appellant has not shown nor have I found anything in the law or in the

implementing regulations which requires that an employee must be transferred before any reduction in force is conducted by the gaining agency. This does not mean, however, that the employee must actually be transferred either physically or on paper. See Federal Personnel Manual, Chapter 351-5. The right to transfer insures a right to compete for retention in such positions as may be established in the gaining competitive area. Competition is among employees of the gaining, not the losing, competitive area. Since OCS was established as a new office, it had no employees and it was filling its positions with former CSA employees through the use of a Preference

Order Master List.^{2/} The Office of Personnel Management has stated in the Federal Personnel Manual that an employee need not be transferred in fact or on paper if more employees are identified for transfer than the gaining agency will be able to accommodate. This was the case in the transfer of former CSA employees to OCS. CSA, however, was unable to act as the agent of OCS. See Federal Personnel Manual, Chapter 351, Subchapter 5-3. CSA had already been abolished before the Department of Health and Human Services took any action to effect a transfer of function. Therefore, the transfer had to

^{2/} All former full-time, permanent, CSA employees with rights to compete for positions in the OCS office in Atlanta, Georgia were listed in tenure group and service computation date order. be accomplished retroactively. The

Department of Health and Human Services essentially canceled the RIF action and effected retroactive corrective action in those cases where it found an employee would have been entitled to retention. The competition was only among former CSA employees. The Board's Order, referred to above, found no reversible error per se in the fact that numerous employees were "transferred" to lower graded positions at OCS or were separated.

Regarding the positions identified by the appellant as ones for which she qualified, none were given to employees with less retention standing. Another group of five positions, which the appellant contends were not filled by employees whose functions transferred or were as qualified as she, were all temporary positions. The agency presented

testimony that it had not been required to fill these temporary positions in retention order, but attempted to some extent to do so.

Those temporary positions which were established for the Transition Function were reconsidered by the agency since the Board found this function transferred. Employees of the agency personnel office reviewed the existing records and determined who would have been entitled to these positions had they been considered permanent. Under this exercise, the last person on the master list to be entitled to a position would have been employee number 18. Appellant was listed as number 36.

The record discloses that there were at least 10 higher standing employees who also did not get offers of reemployment who are appellants. I find that these employees would have entitlement over appellant for any positions available for which appellant qualified. Accordingly, I find that any error by the agency in its original staffing of the transition function positions did not in any way infringe upon any RIF right of the appellant. I further find that the agency has not improperly denied the appellant any retention.

DECISION

The reduction-in-force action affecting the appellant is hereby AFFIRMED.

NOTICE

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on December 8, 1985 unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§ 120.113, .117. Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel, may seek to have it reviewed by the Board by filing a petition for review with the:

Office of Clerk
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. § 1201.114 of the Board's regulations. (It is not necessary to serve the Regional Office). The parties should note that, pursuant to recent amendments effective August 1,

1985, they are now required to serve any petition for review and any subsequent pleadings on all other parties. For additional information see 50 Fed. Reg. 28895 (July 27, 1985) (to be codified at 5 C.F.R. § 1201.114). The petition for review must set forth objections to the initial decision, supported by references to applicable laws, regulations, and the record.

Any appellant adversely affected or aggrieved by the Board's final decision may obtain judicial review, if the court has jurisdiction, by filing a petition with:

The U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition may not be filed while the case is pending before the Board. To be

91a

timely, the petition for judicial review must be received by the court within 30 days of the final Board decision. 5 U.S.C. § 7703(b)(1).

For the Board:

ROSCOE E. LONG
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

SANDRA N. STOWERS,	)	DOCKET NUMBER
Appellant,	)	AT03518210195-1
)	
v.)	
	)	Date: Nov. 18, 1985
DEPARTMENT OF HEALTH)	
AND HUMAN SERVICES,	)	<u>ROSCOE E. LONG</u>
Agency.	)	Presiding Official
)	

ERRATA TO INITIAL DECISION

In issuing the October 31, 1985 initial decision in the above styled cause, the first full paragraph on page 3 should have read as follows:

Appellant has not shown nor have I found anything in the law or in the implementing regulations which requires that an employee identified with a transferring function be transferred without any change in title, series, and

grade. The identified employee must be transferred before any reduction in force is conducted by the gaining agency. This does not mean, however, that the employee must actually be transferred either physically or on paper. See Federal Personnel Manual, Chapter 351-5. The right to transfer insures a right to compete for retention in such positions as may be established in the gaining competitive area. Competition is among employees of the gaining, not the losing, competitive area. Since OCS was established as a new office, it had no employees and it was filling its positions with former CSA employees through the use

of a Preference Order Master List.1/ The Office of Personnel Management has stated in the Federal Personnel Manual that an employee need not be transferred in fact or on paper if more employees are identified for transfer than the gaining agency will be able to accommodate. This was the case in the transfer of former CSA employees to OCS. CSA, however, was unable to act as the agent of OCS. See Federal Personnel Manual, Chapter 351, Subchapter 5-3. CSA had already been abolished before the Department of Health and Human Services took any action to effect a transfer of function. Therefore, the transfer had to be accomplished

1/ All former full-time, permanent, CSA employees with rights to compete for positions in the OCS office in Atlanta, Georgia, were listed in tenure group and service computation date order.

retroactively. The Department of Health and Human Services essentially canceled the RIF action and effected retroactive corrective action in those cases where it found an employee would have been entitled to retention. The competition was only among former CSA employees. The Board's Order, referred to above, found no reversible error per se in the fact that numerous employees were "transferred" to lower graded positions at OCS or were separated.

For the Board:

ROSCOE E. LONG
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JESSIE B. POOLE,	)	DOCKET NUMBER
Appellant,	)	AT03518210310-1
)	
v.)	
	)	Date: Oct. 31, 1985
DEPARTMENT OF HEALTH)	
AND HUMAN SERVICES,	)	<u>ROSCOE E. LONG</u>
Agency.	)	Presiding Official
)	

INITIAL DECISION

Appellant filed a timely appeal with the Board's Atlanta Regional Office from the action of the Community Services Administration (CSA) separating her through reduction in force effective September 30, 1981.^{1/} The Board has

^{1/} The Community Services Administration was superseded by the Office of Community Services (OCS) within the Department of Health and Human Services effective October 1, 1981.

jurisdiction over this appeal. 5 U.S.C. §§ 1205(a)(1); 7701(a); 5 C.F.R. §§ 351.901 and .202(a)(1). For the reasons set forth below, the action of the agency is AFFIRMED.

The basic facts relating to the demise of the Community Services Administration have been set forth in Certain Former CSA Employees v. Department of Health and Human Services, 21 M.S.P.R. 379 (1984) and Certain Former CSA Employees v. Department of Health and Human Services, 762 F.2d 978 (Fed. Cir. 1985) and need not be repeated here.

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evidence which would tend to establish that she was denied retention to which he was otherwise entitled under 5 C.F.R. § 351.303. The findings and conclusions in the Board's Opinion and Order, including the remand, were affirmed in Certain Former CSA Employees, 762 F.2d at 985.

By Order dated July 16, 1984, appellant was directed to file certain documentation with the Atlanta Regional Office, in accordance with the Board's Order, no later than August 15, 1984. Appellant responded alleging among other things that she was identified with several positions that had transferred to OCS on September 30, 1981. On September 14, 1984, before further action could be taken at the regional office level, the United States Circuit Court of Appeals for

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with the Board as a result of the 1981 CSA reduction in force. Cf. Abbott v. Department of Commerce, 18 M.S.P.R. 429, 431 (1983).

At the time of filing her appeal, appellant requested a hearing and one was held in Atlanta, Georgia, September 23 through 25, 1985. The record was closed on October 7, 1985, after allowing for the submission of written closing arguments from the parties. The record of that hearing and the submissions of the parties have been carefully considered in rendering a decision in this case.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The record reflects that at the time of the RIF appellant was a Community Action Program Field Representative, GS-12. The appellant asserts that her

function was transferred to OCS and the agency has stipulated to this fact. The appellant also asserted that she was qualified for the GS-13 Community Action Program Field Representative temporary position in the Transition Function which, as the evidence disclosed, had been given to an individual who was not a former CSA employee. The agency did not dispute this assertion nor did it present any evidence to refute it. The appellant then argues that under 5 C.F.R. § 351.302(a) and (c), she was entitled to transfer with her function without any change in grade or pay. The appellant's argument is not supported by either statute or regulation. The appellant's assertion is apparently based upon the provision in 5 C.F.R. § 351.303(a) which provides that an

employee must transfer without change in the "tenure" of her employment. The term tenure, however, is not synonymous with either the term "grade" or the term "pay." Tenure is the period of time an employee may reasonably expect to serve under her current appointment. Tenure is granted and governed by the type of appointment under which an employee serves. 5 C.F.R. § 210.102. The appellant further argues that the agency cannot transfer her to a lower graded position, nor separate her because she was entitled to transfer with her function and he contends that the agency is circumventing her rights by conducting a "mythical" reduction in force.

Appellant has not shown nor have I found anything in the law or in the implementing regulations which requires

that an employee must be transferred before any reduction in force is conducted by the gaining agency. This does not mean, however, that the employee must actually be transferred either physically or on paper. See Federal Personnel Manual, Chapter 351-5. The right to transfer insures a right to compete for retention in such positions as may be established in the gaining competitive area. Competition is among employees of the gaining, not the losing, competitive area. Since OCS was established as a new office, it had no employees and it was filling its positions with former CSA employees through the use of a Preference

Order Master List.^{2/} The Office of Personnel Management has stated in the Federal Personnel Manual that an employee need not be transferred in fact or on paper if more employees are identified for transfer than the gaining agency will be able to accommodate. This was the case in the transfer of former CSA employees to OCS. CSA, however, was unable to act as the agent of OCS. See Federal Personnel Manual, Chapter 351, Subchapter 5-3. CSA had already been abolished before the Department of Health and Human Services took any action to effect a transfer of function. Therefore, the transfer had to

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be accomplished retroactively. The Department of Health and Human Services essentially canceled the RIF action and effected retroactive corrective action in those cases where it found an employee would have been entitled to retention. The competition was only among former CSA employees. The Board's Order, referred to above, found no reversible error per se in the fact that numerous employees were "transferred" to lower graded positions at OCS or were separated.

Regarding the positions identified by the appellant as ones for which she qualified, none were given to employees with less retention standing. Another group of five positions, which the appellant contends were not filled by employees whose functions transferred or were as qualified as she, were all temporary posi-

tions. The agency presented testimony that it had not been required to fill these temporary positions in retention order, but attempted to some extent to do so.

Those temporary positions which were established for the Transition Function were reconsidered by the agency since the Board found this function transferred. Employees of the agency personnel office reviewed the existing records and determined who would have been entitled to these positions had they been considered permanent. Under this exercise, the last person on the master list to be entitled to a position would have been employee number 18. Appellant was listed as number 30.

The record discloses that there were at least seven higher standing employees who also did not get offers of reemployment who are appellants. I find that these employees would have entitlement over appellant for any positions available for which appellant qualified. Accordingly, I find that any error by the agency in its original staffing of the transition function positions did not in any way infringe upon any RIF right of the appellant. I further find that the agency has not improperly denied the appellant any retention.

DECISION

The reduction-in-force action affecting the appellant is hereby AFFIRMED.

NOTICE

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on December 6, 1985 unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§ 120.113, .117. Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel, may seek to have it reviewed by the Board by filing a petition for review with the:

Office of Clerk
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. § 1201.114 of the Board's regulations. (It is not necessary to serve the Regional Office). The parties should note that, pursuant to recent amendments effective August 1,

1985, they are now required to serve any petition for review and any subsequent pleadings on all other parties. For additional information see 50 Fed. Reg. 28895 (July 27, 1985) (to be codified at 5 C.F.R. § 1201.114). The petition for review must set forth objections to the initial decision, supported by references to applicable laws, regulations, and the record.

Any appellant adversely affected or aggrieved by the Board's final decision may obtain judicial review, if the court has jurisdiction, by filing a petition with:

The U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition may not be filed while the case is pending before the Board. To be

timely, the petition for judicial review must be received by the court within 30 days of the final Board decision. 5 U.S.C. § 7703(b)(1).

For the Board:

ROSCOE E. LONG
Presiding Official

CERTIFICATE OF SERVICE

JESSE B. POOLE v. DEPARTMENT OF
HEALTH AND HUMAN SERVICES
DOCKET NUMBER AT03518210310-1

I hereby certify that copies of the foregoing initial decision were served this date by regular mail to the individual identified below:

APPELLANT

Jessie B. Poole
3905 Wisteria Lane, S.W.
Atlanta, Georgia 30331

APPELLANT'S REPRESENTATIVE

Jacqueline D. Bennett, Esq.
Attorney at Law
3425 Marietta Tower
101 Marietta Street, N.W.
Atlanta, Georgia 30303

AGENCY REPRESENTATIVE

Diana E. Reid, Esq.
Assistant Regional Counsel
Department of Health and Human Services
101 Marietta Tower, Suite 221
Atlanta, Georgia 30323

112a

OTHER

Date: Oct. 31, 1985 Atlanta Regional Office

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JESSIE B. POOLE,	)	DOCKET NUMBER
Appellant,	)	AT03518210310-1
)	
v.)	
	)	Date: Nov. 18, 1985
DEPARTMENT OF HEALTH)	
AND HUMAN SERVICES,	)	<u>ROSCOE E. LONG</u>
Agency.	)	Presiding Official
)	

ERRATA TO INITIAL DECISION

In issuing the October 31, 1985 initial decision in the above styled cause, the first full paragraph on page 3 should read as follows:

Appellant has not shown nor have I found anything in the law or in the implementing regulations which requires that an employee identified with a transferring function be transferred without any change in title, series, and

grade. The identified employee must be transferred before any reduction in force is conducted by the gaining agency. This does not mean, however, that the employee must actually be transferred either physically or on paper. See Federal Personnel Manual, Chapter 351-5. The right to transfer insures a right to compete for retention in such positions as may be established in the gaining competitive area. Competition is among employees of the gaining, not the losing, competitive area. Since OCS was established as a new office, it had no employees and it was filling its positions with former CSA employees through the use

of a Preference Order Master List.^{1/} The Office of Personnel Management has stated in the Federal Personnel Manual that an employee need not be transferred in fact or on paper if more employees are identified for transfer than the gaining agency will be able to accommodate. This was the case in the transfer of former CSA employees to OCS. CSA, however, was unable to act as the agent of OCS. See Federal Personnel Manual, Chapter 351, Subchapter 5-3. CSA had already been abolished before the Department of Health and Human Services took any action to effect a transfer of function. Therefore,

^{1/} All former full-time, permanent, CSA employees with right to compete for positions in the OCS office in Atlanta, Georgia, were listed in tenure group and service computation date order.

the transfer had to be accomplished retroactively. The Department of Health and Human Services essentially canceled the RIF action and effected retroactive corrective action in those cases where it found an employee would have been entitled to retention. The competition was only among former CSA employees. The Board's Order, referred to above, found no reversible error per se in the fact that numerous employees were "transferred" to lower graded positions at OCS or were separated.

For the Board:

ROSCOE E. LONG
Presiding Official

UNITED STATES OF AMERICA
 MERIT SYSTEMS PROTECTION BOARD
 ATLANTA REGIONAL OFFICE

JOHN J. McCALL,
 Appellant,

v.

DEPARTMENT OF HEALTH
 AND HUMAN SERVICES,
 Agency.

)
) DOCKET NUMBER
) AT03518210194-1
)

) Date: Oct. 18, 1985

) ROSCOE E. LONG
) Presiding Official
)

INITIAL DECISION

Appellant filed a timely appeal with the Board's Atlanta Regional Office from the action of the Community Services Administration (CSA) separating him through reduction in force effective September 30, 1981.^{1/} The Board has

^{1/} The Community Services Administration was superseded by the Office of Community Services (OCS) within the Department of Health and Human Services effective October 1, 1981.

jurisdiction over this appeal. 5 U.S.C. §§ 1205(a)(1); 7701(a); 5 C.F.R. §§ 351.901 and .202 (a) (1). For the reasons set forth below, the action of the agency is AFFIRMED.

The basic facts relating to the demise of the Community Services Administration have been set forth in Certain Former CSA Employees v. Department of Health and Human Services, 21 M.S.P.R. at 379 (1984) and Certain Former CSA Employees v. Department of Health and Human Services, 762 F.2d 978 (Fed. Cir. 1985) and need not be repeated here.

On June 18, 1984, the Board issued an Opinion and Order, Certain Former CSA Employees, 21 M.S.P.R. which, among other things, remanded this appeal to the Atlanta Regional Office in order to afford appellant an opportunity to present evi-

dence which would tend to establish that he was denied retention to which he was otherwise entitled under 5 C.F.R. § 351.303. The findings and conclusions in the Board's Opinion and Order, including the remand, were affirmed in Certain Former CSA Employees, 762 F.2d at 985.

By Order dated July 16, 1984, appellant was directed to file certain documentation with the Atlanta Regional Office, in accordance with the Board's Order, no later than August 15, 1984. Appellant responded alleging among other things that he was identified with several positions that had transferred to OCS on September 30, 1981. On September 14, 1984, before further action could be taken at the regional office level, the United States Circuit Court of Appeals for

the Federal Circuit issued an Order which stayed the administrative processing of all CSA appeals pending a ruling by the Court. The Stay Order was lifted when it issued its decision in Certain Former CSA Employees, 762 F.2d 978. Administrative processing of the appeals commenced again on July 17, 1985.

By subsequent Order dated July 24, 1985, appellant was again directed to file specific documentation with the Atlanta Regional Office identifying the position or positions which she was identified with in CSA that transferred to OCS, as of September 30, 1981. The appellant made a timely response to this subsequent Order. The purpose for the above referenced Orders is to provide for the orderly adjudication of the numerous appeals filed with the Board as a result of the 1981 CSA

reduction in force. Cf. Abbott v. Department of Commerce, 18 M.S.P.R. 429, 431 (1983).

At the time of filing his appeal, appellant requested a hearing and one was held in Atlanta, Georgia, September 23 through 25, 1985. The record was closed on October 7, 1985, after allowing for the submission of written closing arguments from the parties. The record of that hearing and the submissions of the parties have been carefully considered in rendering a decision in this case.

FINDINGS OF FACT AND CONCLUSION OF LAW

The record reflects that at the time of the RIF appellant was a Community Action Program Field Representative, GS-13. The appellant asserts that his function was transferred to OCS and the

agency has stipulated to this fact. The appellant also asserted that he was qualified for GS-13 Community Action Program Field Representative temporary position in the Transition Function which, as the evidence disclosed, had been given to an individual who was not a former CSA employee. The agency did not dispute this assertion nor did it present any evidence to refute it. The appellant then argues that under 5 C.F.R. § 351.302(a) and (c), he was entitled to transfer with his function without any change in grade or pay. The appellant's argument is not supported by either statute or regulation. The appellant's assertion is apparently based upon the provision in 5 C.F.R. §351.303(a) which provides that an employee must transfer without change in the "tenure" of his employment. The term

tenure, however, is not synonymous with either the term "grade" or the term "pay." Tenure is the period of time an employee may reasonably expect to serve under his current appointment. Tenure is granted and governed by the type of appointment under which an employee serves. 5 C.F.R. §210.102. The appellant further argues that the agency cannot transfer him to a lower graded position, nor separate him because he was entitled to transfer with his function and he contends that the agency is circumventing his rights by conducting a "mythical" reduction in force.

Appellant has not shown nor have I found anything in the law or in the implementing regulations which requires that an employee must be transferred before any reduction in force is

does not mean, however, that the employee must actually be transferred either physically or on paper. See Federal Personnel Manual, Chapter 351-5. The right to transfer insures a right to compete for retention in such positions as may be established in the gaining competitive area. Competition is among employees of the gaining, nor the losing, competitive area. Since OCS was established as a new office, it had no employees and it was filling its positions with former CSA employees through the use of a Preference Order Master List.2/ The Office of Personnel Management has stated

2/ All former full-time, permanent, CSA employees with rights to compete for positions in the OCS office in Atlanta, Georgia were listed in tenure group and service computation date order.

employee need not be transferred in fact or on paper if more employees are identified for transfer than the gaining agency will be able to accomodate. This was the case in the transfer of former CSA employees to OCS. CSA, however, was unable to act as the agent of OCS. See Federal Personnel Manual, Chapter 351, Subchapter 5-3. CSA had already been abolished before the Department of Health and Human Services took any action to effect a transfer of function. Therefore, the transfer had to be accomplished retroactively. The Department of Health and Human Services essentially canceled the RIF action and effected retroactive corrective action in those cases where it found an employee would have been entitled to retention. The competition was only

among former CSA employees. The Board's Order, referred to above, found no reversible error per se in the fact that numerous employees were "transferred" to lower graded positions at OCS or were separated.

Regarding the positions identified by the appellant as ones for which he qualified, none were given to employees with less retention standing. Another group of five positions, which the appellant contends were not filled by employees whose functions transferred, were all temporary positions. The agency presented testimony that it had not been required to fill these temporary positions in retention order, but attempted to some extent to do so.

established for the Transition Function were reconsidered by the agency since the Board found this function transferred. Employees of the agency personnel office reviewed the existing records and determined who would have been entitled to these positions had they been considered permanent. Under this exercise, the last person on the master list to be entitled to a position would have been employee number 18. Appellant was listed as number 31.

The record discloses that in the category of positions identified by appellant for which he qualified the last person on the master list to be entitled to a position would have been employee number 13. Therefore, there were at least 10 higher standing employees, holding

similiar job classifications who also did not get offers of reemployment and are apppellants. I find that anyone of them would have entitlement over appellant for any positions available for which appellant qualified. Accordingly, I find that any error by the agency in its original staffing of the transition function positions did not in any way infringe upon any RIF right of the appellant. I further find that the agency has not improperly denied the appellant any retention.

DECISION

The reduction-in-force action affecting the appellant is hereby AFFIRMED.

NOTICE

This initial decision of the Merit

final decision of the Board on Dec. 6, 1985 unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§ 120.113, .117. Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel, may seek to have it reviewed by the Board by filing a petition for review with the:

Office of Clerk
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. § 1201.114 of the Board's regulations. (It is not necessary to serve the Regional Office). The parties should note that, pursuant to recent amendments effective August 1, 1985, they are now required to serve any petition for review and any subsequent

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

JOHN J. McCALL,	)	DOCKET NUMBER
Appellant,	)	AT03518210194-1
)	
v.)	
	)	Date: Nov. 18, 1985
DEPARTMENT OF HEALTH)	
AND HUMAN SERVICES,	)	ROSCOE E. LONG
Agency.	)	Presiding Official

ERRATA TO INITIAL DECISION

In issuing the October 31, 1985 initial decision in the above styled cause, the first full paragraph on page 3 should have read as follows:

Appellant has not shown nor have I found anything in the law or in the implementing regulations which requires that an employee identified with a transferring function be transferred without any change in title, series, and

1985, they are now required to serve any petition for review and any subsequent pleadings on all other parties. For additional information see 50 Fed. Reg. 28895 (July 27, 1985) (to be codified at 5 C.F.R. § 1201.114). The petition for review must set forth objections to the initial decision, supported by references to applicable laws, regulations, and the record.

Any appellant adversely affected or aggrieved by the Board's final decision may obtain judicial review, if the court has jurisdiction, by filing a petition with:

The U.S. Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition may not be filed while the case is pending before the

grade. The identified employee must be transferred before any reduction in force is conducted by the gaining agency. This does not mean, however, that the employee must actually be transferred either physically or on paper. See Federal Personnel Manual, Chapter 351-5. The right to transfer insures a right to compete for retention in such positions as may be established in the gaining competitive area. Competition is among employees of the gaining, not the losing, competitive area. Since OCS was established as a new office, it had no employees and it was filling its positions with former CSA employees through the use

Board. To be timely, the petition for judicial review must be received by the court within 30 days of the final Board decision. 5 U.S.C. § 7703(b)(1).

For the Board:

ROSCOE E. LONG
Presiding Official

additional information see 50 Fed. Reg. 28895 (July 27, 1985) (to be codified at 5 C.F.R. § 1201.114). The petition for review must set forth objections to the initial decision, supported by references to applicable laws, regulations, and the record.

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The U. S. Court of Appeals
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Washington, D.C. 20439

Such a petition may not be filed while the case is pending before the Board. To be timely, the petition for judicial review must be received by the court within 30

131a

U.S.C. 7703(b) (1).

For the Board:

ROSCOE E. LONG
Presiding Official

of a Preference Order Master List.^{1/} The Office of Personnel Management has stated in the Federal Personnel Manual that an employee need not be transferred in fact or on paper if more employees are identified for transfer than the gaining agency will be able to accommodate. This was the case in the transfer of former CSA employees to OCS. CSA, however, was unable to act as the agent of OCS. See Federal Personnel Manual, Chapter 351, Subchapter 5-3. CSA had already been abolished before the Department of Health and Human Services took any action to effect a transfer of function. Therefore,

^{1/} All former full-time, permanent, CSA employees with rights to compete for positions in the OCS office in Atlanta, Georgia, were listed in tenure group and service computation date order.

the transfer had to be accomplished retroactively. The Department of Health and Human Services essentially canceled the RIF action and effected retroactive corrective action in those cases where it found an employee would have been entitled to retention. The competition was only among former CSA employees. The Board's Order, referred to above, found no reversible error per se in the fact that numerous employees were "transferred" to lower graded positions at OCS or were separated.

For the Board:

ROSCOE E. LONG
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

BERNARD S. HOROWITZ,
Appellant,

v.

DEPARTMENT OF HEALTH
AND HUMAN SERVICES,
Agency.

) DOCKET NUMBER
) AT03518210161-1
)

) Date: Oct. 31, 1985

) ROSCOE E. LONG
) Presiding Official
)

INITIAL DECISION

On October 16, 1981, appellant filed an appeal with the Board's Atlanta Regional Office from the action of the Community Services Administration (CSA) separating him through reduction in force effective September 30, 1981, 1/ The Board

1/ The Community Services Administration was superseded by the Office of Community Services (OCS) within the Department of Health and Human Services effective October 1, 1981.

has jurisdiction over this appeal. 5 U.S.C. §§ 1205(a)(1); 7701(a); 5 C.F.R. §§ 351.901 and .202(a)(1). For the reasons set forth below, the action of the agency is AFFIRMED.

The basic facts relating to the demise of the Community Services Administration have been set forth in Certain Former CSA Employees v. Department of Health and Human Services, 21 M.S.P.R. 379 (1984) and Certain Former CSA Employees v. Department of Health and Human Services, 762 F.2d 978 (Fed. Cir. 1985) and need not be repeated here.

On June 18, 1984, the Board issued an Opinion and Order, Certain Former CSA Employees, 21 M.S.P.R. at 394, which, among other things, remanded this appeal to the Atlanta Regional Office in order to afford appellant an opportunity to present

evidence which would tend to establish that he was denied retention to which he was otherwise entitled under 5 C.F.R. § 351.303. The findings and conclusions in the Board's Opinion and Order, including the remand, were affirmed in Certain Former CSA Employees, 762 F.2d at 985.

By Order dated July 16, 1984, appellant was directed to file certain documentation with the Atlanta Regional Office, in 1984. Appellant, in response to this Order stated, "the function of the Effective Guidance Division, Community Services Administration, Atlanta was continued by the Program Assessment Section, Health and Human Services, Atlanta in the Closeout, Discretionary Program and Transitional Grants." On

September 14, 1984, before further action could be taken at the regional office level, the United States circuit Court of Appeals for the Federal Circuit issued an Order which stayed the administrative processing of all CSA appeals pending a ruling by the Court. The Stay Order was lifted when it issued its decision in Certain Former CSA Employees, 762 F.2d 978. Administrative processing of the appeals commenced again on July 17, 1985.

By subsequent Order dated July 24, 1985, appellant was again directed to file specific documentation with the Atlanta Regional Office identifying the position or positions which he was identified with in CSA that transferred to OCS, as of September 30, 1981. The appellant did not respond to this subsequent Order. The purpose for the above referenced Orders is

to provide for the orderly adjudication of the numerous appeals filed with the Board as a result of the 1981 CSA reduction in force. Cf. Abbott v. Department of Commerce, 18 M.S.P.R. 429, 431 (1983).

At the time of filing his appeal, appellant requested a hearing and one was scheduled in Atlanta, Georgia, commencing on September 23, 1985. Appellant failed to appear for the hearing and did not contact the presiding official prior to the hearing to request a postponement. by Order dated September 25, 1985, appellant was afforded the opportunity to show good cause for his absence from the hearing and also why his appeal should not be decided upon the record. Absent such a showing, appellant was given 15 days to submit additional evidence and/or argument in

support of his position.^{2/} Appellant has made no response to this Order. therefore, the matter is being decided on the record.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

The record reflects that at the time of the RIF appellant was a Program Analyst in the Effective Guidance Division (CSA), GS-13. Following the RIF, he was never offered reemployment. Appellant argues that some former CSA employees who were offered employment were less qualified than he. The record also discloses that

^{2/} Pursuant to the court's decision in Callahan v. Department of the Navy, 748 F.2d 1556 (Fed. Cir. 1984), which held that when an appellant is absent from a Board hearing without justification, the proper procedure is to consider the case on the basis of the record.

one GS-13 level position was filled by someone who was not a former CSA employee.

As has been outlined and discussed at length in the previously referenced decisions on this RIF, the agency gave special hiring preference to former CSA employees "after the fact" and used a Preference Order Master List. Such lists were prepared for each competitive area and listed all former full-time, permanent CSA employees with rights to compete in that area, in tenure group and service computation date order. Comparisons of employees' qualifications were not done. Employees were offered positions in order if they were found to be basically qualified. On this list, appellant was number 33.

The agency filled 11 positions from the Preference Order Master List. It also

filled an additional six positions dealing with the transition function for a total of 17 positions. One of the six transition positions was the GS-13 position referred to above. The record reflects that CSA had 76 employees in the Atlanta Regional office as of September 30, 1981. The agency concedes that under the Board's decision finding the transition function transferred from CSA to OCS, its action of placing someone who was not a former CSA employee was incorrect.

Appellant does not contend that he was qualified for the GS-13 position referred to above. Likewise, the other 16 positions were filled by former CSA employees who had higher standing than did appellant. Additionally, the record

establishes that there were at least four higher standing employees who also did not get offers of reemployment who are appellants. I find that anyone of them would have entitlement over appellant for any positions available. Accordingly, I find that any error by the agency in its original staffing of the transition function positions did not in any way infringe upon any RIF right of the appellant. I further find that the agency has not improperly denied the appellant any retention.

DECISION

The reduction-in-force action affecting the appellant is hereby AFFIRMED.

NOTICE

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on December 6, 1985 unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§ 120.113, .117. Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel, may seek to have it reviewed by the Board by filing a petition for review with the:

Office of Clerk
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in accordance with 5 C.F.R. § 1201.114 of the Board's regulations. (It is not necessary to serve the Regional Office). The parties should note that, pursuant to recent amendments effective August 1,

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE

KENNETH D. JANEY, et al. Appellants	)	DOCKET NUMBER
v.	)	See Appendix For
DEPARTMENT OF HEALTH AND HUMAN SERVICES, Agency.	)	names and docket numbers
	)	Date: Oct. 22, 1985
	)	JOHN F. MANKUNS
	)	Presiding Official

DECISION

On June 18, 1984, the Board remanded the appeals of the appellants listed in the attached appendix 1/ to the Boston Regional Office. By order dated July 22, 1985,2/ in accordance with the Board's

1/ Mr. Kenneth D. Daney is deceased. Ms. Daisy Janey, his widow, was substituted as a party under 5 C.F.R. §1201.35.

2/ The proceedings were delayed due to intervening court action.

remand instructions, appellants were afforded an opportunity to assert that they were identified with a continuing function transferred from the now defunct Community Services Administration (CSA) to the Department of Health and Human Services (HHS), Office of Community Services (OCS), and to further identify a position or positions for which they were qualified that have been assigned to other employees with less retention standing or positions occupied by employees who had initial entitlement to transfer. Appellants were also advised that if they failed to meet this burden their appeals would be dismissed for failure to prosecute. For the reasons set forth below, these appeals are dismissed.

FINDINGS AND CONCLUSIONS

In its June 18, 1984 Opinion and Order, the Board noted that in Losure v. Interstate Commerce Commission, 2 MSPB 361 (1980), it held that there are three steps to be applied in adjudicating reduction-in-force (RIF) appeals. First, the agency has the initial burden of establishing that the RIF action was initiated for appropriate reasons. Second, the appellant has the burden of moving forward by presenting specific exceptions to the action. The third stage calls for the agency to present evidence confirming that the action was effected in accordance with the reduction-in-force regulations. Opinion and Order at 20, n. 26. In both the Board's Opinion and Order and in the presiding official's order of July 22, 1985, each appellant was given notice that

the burden in this case had shifted to him/her to come forward with allegations of sufficient specificity to enable the agency to address the contested matters in its presentation of evidence and that failure to meet this burden would result in dismissal with prejudice for failure to prosecute.

APPELLANT JANEY'S CLAIM

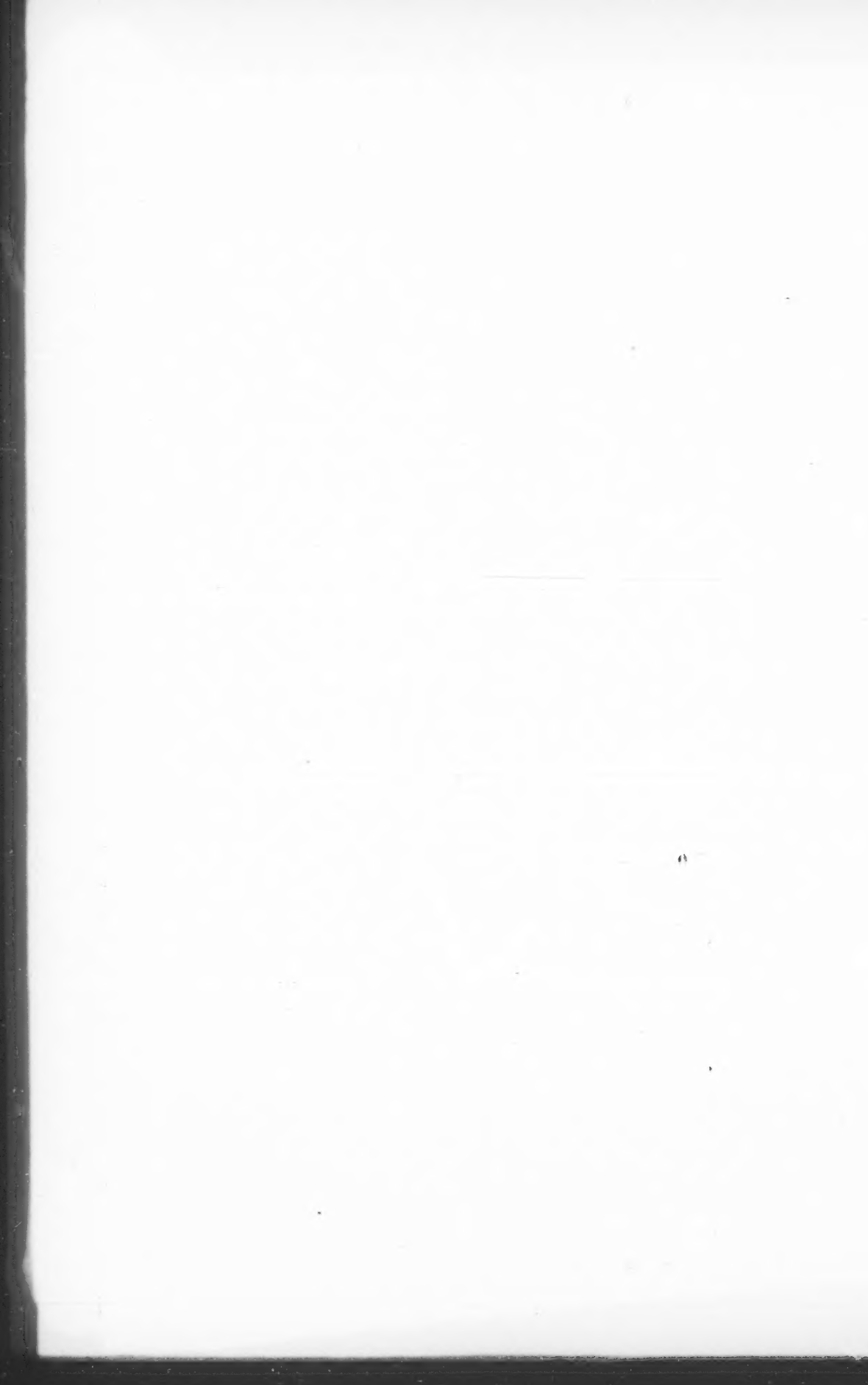
Appellant Janey responded to the July 22, 1985 order by first claiming entitlement to a position he identified as "Outplacement Coordinator", GS-301-13, occupied by a competing employee, Mr. Edmond Kelly. He next claimed entitlement to a Secretary (Typing) GS-318-7 position occupied by another competing employee, Ms. Anna Haley.

Under the Board's remand order of June 18, 1984, Mr. Janey's burden was to present information tending to show that he was denied retention to which he was otherwise entitled under 5 C.F.R. §351.303 (1981). Neither claim was sufficient to meet this burden.

Mr. Janey occupied a Field Representative, GS-301-12 position which at CSA, but claimed entitlement to a GS-301-13 position. There is no entitlement to a promotion during a reduction in force. Non-selection during a reduction in force is a non-appealable action. Green v. Defense Logistics Agency, MSPB Docket No. AT03518410791 (March 19, 1985); Mello v. Department of Energy, MSPB Docket No. DCO3518210797 (March 19, 1984).

Appellant Janey belongs to a subgroup superior to Ms. Haley. Mr. Janey belongs to Group I, subgroup A, while Ms. Haley belongs to Group I, subgroup B. However, he is only entitled to the Secretary (Typing) GS-318-7 position if he can show that he also meets the Office of Personnel Management's (OPM's) minimum qualification requirements. 5 C.F.R. §351.701(a) (1981); Lewellen v. Department of the Air Force, MSPB Docket No. DA03518410310 (January 2, 1985).

In response to appellant's claim, the agency offered a copy of an SF-171 prepared by Mr. Janey in which he claimed typing skills of twenty words per minute. Mr. Janey's response to the July 22, 1985 order was silent regarding his specific typing skills. The minimum Federal Personnel Manual (FPM) qualification stan-





dards for secretary (Typing) GS-318-7 positions incorporate the qualification standard of the Clerk-Typist, GS-322 series. The minimum qualification requirements at entry level (GS-2) require a minimum typing proficiency of forty words per minute.

Because Appellant Janey's response to the July 22, 1985 order was insufficient to meet his burden under the Board's remand order, I proposed to dismiss his appeal for failure to prosecute. Appellant Janey responded to this proposal, but presented no new or additional legal or factual grounds tending to show that he was denied retention to which he was otherwise entitled under 5 C.F.R. §351.303 (1981). He maintained that he was entitled to a hearing on his claims

because the agency was required to establish that its classification of the claimed positions was correct. However, the agency has an obligation to establish the proper classification of a position in a reduction-in-force appeal only in connection with a non-frivolous allegation that the classification action affecting his substantive RIF rights was a sham. See Lewis v. Department of the Army, 4 MSPB 350 (1980). No such allegation was made by the appellant. Accordingly, for all the foregoing reasons, dismissal is warranted.

APPELLANT KAUFMAN'S APPEAL

Appellant Kaufman responded to the July 22, 1985 order by claiming entitlement to GS-905-15 Attorney-Advisor positions occupied by competing employees John C. Meyer and Spencer L. Lott. Appellant

Kaufman held a GS-905-14 Attorney-Advisor position at CSA.

As discussed above in connection with Appellant Janey's claim, non-selection for a promotion during a reduction in force is a non-appealable action. Green, MSPB Docket No. AT03518410791 (March 19, 1985). Because Appellant Kaufman's response to the July 22, 1985 order was insufficient to meet her burden under the Board's remand order, I again proposed to dismiss her appeal for failure to prosecute.

She responded to this proposal, but provided no additional support for her claim other than an argument that the agency was required to establish that its classification of the claim position was correct. As also discussed above in connection with Appellant Janey's appeal,

the agency has no such obligation. See Lewis, 4 MSPB 350 (1980). Accordingly, Appellant Kaufman's appeal is dismissed.

APPELLANT NEGRON'S CLAIM

Appellant Negrón responded to the July 22, 1985 order by claiming entitlement to the position identified as "Outplacement Coordinator", GS-301-13, occupied by Mr. Kelly. Appellant Janey also claimed entitlement to this position. Like Mr. Janey, Appellant Negrón occupied a Field Representative GS-301-12 position while at CSA. As previously discussed, there is no entitlement to a promotion during a reduction in force and non-selection for promotion during a RIF is a non-appealable action. Green, MSPB Docket No. AT3518410791 (March 19, 1985). Because Appellant Negrón's response to the July 22, 1985 order was insufficient to

meet his burden under the Board's remand order, I again proposed to dismiss his appeal for failure to prosecute.

He responded to this proposal, but provided no additional support for his claim other than the argument that the agency was required to establish that its classification of the claimed position was correct. As discussed in connection with Appellants Janey's and Kaufman's appeals, the agency has no such obligation. See Lews, 4 MSPB 350. Accordingly, Appellant Negrón's appeal is dismissed.

APPELLANTS' COMMON CLAIM OF ALLEGED CIVIL
RIGHTS VIOLATIONS

All of the appellants claimed that the agency's actions were done "in violation of the Affirmative Action Laws and Civil Rights Executive Orders as amended." Allegations that the agency

committed prohibited personnel practices, even assuming such allegations can be established, do not confer appellate jurisdiction on the Board. See Grigg v. Department of Interior, 5 MSPB 446 (1980). As reflected above, appellants have not established an independent basis for Board jurisdiction. Therefore, these allegations will not be addressed.

REVIEW RIGHTS

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on November 26, 1985 unless a petition for review is filed with the Board or the Board reopens the case on its own motion. 5 C.F.R. §1201.113 and .117.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review

of this initial decision with the Merit Systems Protection Board. All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The Board may grant a petition for review when the criteria set out in 5 C.F.R. §1201.115 are met.

The petition for review must be filed no later than November 26, 1985 with:

Office of the Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

One original and one copy of the petition must be filed with the Clerk of the Board. (It is not necessary to serve the Regional Office.) The parties should note that, pursuant to recent amendments effective August 1, 1985, they are now required to

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serve any petition for review and any subsequent pleadings on all other parties. A copy of these important amendments is attached to this decision. For additional information see 50 Fed. Reg. 28895.

The appellant is hereby notified of the right under 5 U.S.C. §77033 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review with:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition must be received by the court no later than thirty (30) days after the date the Board's decision becomes final. 5 U.S.C. §7703(b)(1).

For the Board:

John F. Markuns
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE

RAYMOND C. AHLBERG,)	
et al.)	
Appellant,	)	Case No. SEE
	)	APPENDIX for
	)	names and
v.	)	docket numbers
	)	Date: Aug. 15, 1985
DEPARTMENT OF HEALTH)	
AND HUMANSERVICES,	)	<u>JOHN F. MARKUNS</u>
Agency.	)	Presiding Official
)	

DECISION

On June 18, 1984, the Board remanded the appeals of the appellants listed in the attached appendix to the Boston Regional Office. By order dated July 22, 1985,^{1/} in accordance with the Board's remand instructions, appellants were

^{1/} The proceedings were delayed due to intervening court action.

afforded an opportunity to assert that they were identified with a continuing function transferred from the now defunct Community Services Administration (CSA) to the Department of Health and Human Services (HHS), Office of Community Services (OCS), and to further identify a position or positions for which they were qualified that have been assigned to other employees with less retention standing or positions occupied by employees who had no initial entitlement to transfer. Appellants were also advised that if they failed to respond to this order their appeals would be dismissed for failure to prosecute. For the reasons set forth below, these appeals are DISMISSED.

FINDINGS AND CONCLUSIONS

In its Opinion and Order, the Board noted that in Losure v. Interstate Com-

merce Commission, 2 MSPB 361 (1980), it held that there are three steps to be applied in adjudicating reduction-in-force (RIF) appeals. First, the agency has the initial burden of establishing that the RIF action was initiated for appropriate reasons. Second, the appellant has the burden of moving forward by presenting specific exceptions to the action. The third stage calls for the agency to present evidence confirming that the action was effected in accordance with the reduction-in-force regulations. Opinion and Order at 20, n. 26. In both the Board's Opinion and Order and in the presiding official's order of July 22, 1985, each appellant was given notice that the burden in this case had shifted to them to come forward with allegations of sufficient to

enable the agency to address the contested matters in its presentation of evidence and that failure to meet this burden would result in dismissal with prejudice for failure to prosecute.

The record reflects that none of the appellants listed in the attached appendix provided the information requested in the July 22, 1985 order and with one

exception^{2/}, did not respond to this order in any way. Consequently, I find that these appellants have failed to meet their burden of presenting specific exceptions to the agency's actions and have failed to prosecute their appeals. Accordingly, I must dismiss their appeals with prejudice. Debold v. Department of the Navy, 9 MSPB 95 (1982); Bennett v. Department of the Navy, 2 MSPB 93 (1980).

^{2/} Appellant Kirrane responded and generally challenged the methodology used by CSA and HHS in the transfer and RIF. He also challenged the use of non-CSA personnel to perform certain duties related to CSA's block grant function. These issues have been addressed in the Board's June 18, 1984 order and that order does not afford the parties an opportunity to relitigate these issues. Appellant Kirrane did not claim entitlement to a specific OCS position in his response. Thus, I find that he has failed to provide the information required by the Board.

REVIEW RIGHTS

This is an initial decision. It will become a final decision of the Merit Systems Protection Board on September 19, 1985 unless a petition for review is filed with the Board or the Board reopens the case on its own motion. 5 C.F.R. 1201.113 and .117 (1985).

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this initial decision with the Merit Systems Protection Board. All petitions for review shall set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record. The Board may grant a petition for review when the criteria set out in 5 C.F.R. 1201.115 are met.

The petition for review must be filed no later than September 19, 1985 with:

Office of the Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

One original and one copy of the petition must be filed with the Clerk of the Board. (It is not necessary to serve the Regional Office.) The parties should note that, pursuant to recent amendments effective August 1, 1985, they are now required to serve any petition for review and any subsequent pleadings on all other parties. A copy of these important amendments is attached to this decision. For additional information see 50 Fed. Reg. 28895.

The appellant is hereby notified of the right under 5 U.S.C. 7703 to seek judicial review, if the court has

jurisdiction, of the Board's action by
filing a petition for review with:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Such a petition must be received by the
court no later than thirty (30) days after
the date the Board's decision becomes
final.

For the Board:

JOHN F. MARKUNS
Presiding Official

APPENDIX

AHLBERG, RAYMOND C.	BN03518210134REM
COOPER, MARILYN	0035REM
COOPER, SYLVIA	0033REM
COX, WILLIAM	0028REM
CUMMINGS, THOMAS	0025REM
DAY, WALTER	0038REM
FAYE, LAWRENCE	0021REM
KELLY, EDMOND	0024REM
KELLY, LAWRENCE	0029REM
KIRrane, MICHAEL	0023REM
KEEN, ARTHUR	0018REM
NEWTON, NELSON	0132REM
SHIELDS, ANNE	0031REM
TIERNEY, MARY	0026REM
WYSE, ELAINE	0022REM
WILLIAMS, CHERYL	0019REM

UNITED STATES OF AMERICA
 MERIT SYSTEMS PROTECTION BOARD
 SEATTLE REGIONAL OFFICE

_____)	
JOHN P. ALBERS, et. al.,)	)	Case No.
Appellants,	)	SE03518210164-1
v.)	
	)	Date: Oct. 30, 1985
DEPARTMENT OF HEALTH)	
HUMAN SERVICES,	)	<u>JOHN W. TAPP</u>
AGENCY	)	Presiding Judge
_____)	

DECISION

I. Introduction

Each of the seven appellants in this consolidated case^{1/} timely appealed from the action of the Community Services Administration separating them through reduction-in-force (RIF) procedures,

^{1/} These appeals were consolidated at the regional level by Order dated July 18, 1984. (Board Master File Tab 1). The seven appellants in this consolidated group are listed in Appendix A.

effective September 30, 1981. The Merit Systems Protection Board has jurisdiction over these appeals pursuant to 5 U.S.C. §7701(a) and 5 C.F.R. §351.901 (1981).

For the reasons explained below, the RIF action is sustained as to appellants Jacob, Putnam, Wright, and Sumida. It is not sustained as to appellant Van Pelt. The appeals of appellants Albers and Hodges are dismissed for failure to prosecute.

II. Background

Appellants were among the more than 900 employees separated by procedures when the Community Services Administration (CSA) was abolished as an independent agency effective October 1, 1981. The separated employees went to court claiming they had a right to transfer with their functions to the newly-established Office

of Community Services (OCS), an operating division of the Department of Health and Human Services (DHHS). The Court agreed^{2/} and 65 former CSA employees were ultimately hired by OCS retroactive to September 30, 1981. These employees were hired in accordance with "Preference Order Master Listings" (hereinafter, "Master Listing") developed by the agency which essentially gave effect to all the required RIF factors (tenure group, length of service, and competitive area) except competitive level. A number of former CSA employees who were not hired, or were hired into lower-graded positions,

^{2/} See National Counsel of CSA Local, American Federation of Government Employees (AFGE) AFL-CIO v. Schweiker, 526 F.2d Supp. 861 (D.D.C. 1981).

appealed to the Merit Systems Protection Board (the Board). The Board consolidated their appeals at the national level to determine a variety of issues.^{3/}

The Board found that a transfer of function had occurred and that the agency had failed to identify employees with their function or accord transfer rights as required by statute and regulation.^{4/} Former Community Services Administration Employees v. Department of Health and Human Services, 21 M.S.P.R. 379 (1984). The Board held, however, that the agency error did not warrant "unconditional reversal" of the entire RIF. Rather, the Board remanded

³ See Former Community Services Administration Employees v. Department of Health and Human Services, 9 M.S.P.B. 483, 9 M.S.P.R. 299 (1982).

^{4/} See 5 U.S.C. §§ 3502 and 5 C.F.R. Part 351 (1981).

the cases to the regional level to allow appellants an opportunity to demonstrate that they were identified with a continuing function and had been denied a position for which they were qualified because the position had been assigned to another employee with less retention standing or no initial entitlement to transfer. The Board stated that once an employee made this showing, the agency would have to refute the evidence or demonstrate that, notwithstanding any error, the employee would have not been retained. Id. at 393-4.

The Board's decision was affirmed on appeal. See Certain Former CSA Employees v. Department of Health and Human Services, 726 978 (Fed. Cir. 1985). In that decision, at 984, the Court stated that:

Since it is conceded by all parties before us that all Community Services Administration employees were identified with functions that were transferred, the only issue on the remand will be the relative retention priorities of the employee claiming the particular position and the employee appointed to it.

A hearing was held on September 16, 1985, for the five appellants who had requested one. Appellants Albers and Hodges specifically declined hearings.

III. Failure to Prosecute -- Appellants Albers and Hodges

Following remand to the Seattle Regional Office, each appellant was ordered to indicate in writing by a date certain whether they still wished to pursue their appeals. See Board Master File Tab 24. The Orders to appellants Albers and Charles W. Hodges also specifically ordered them to respond in

writing by a date certain to agency evidence that they had been reinstated to positions which constituted the best offer based on their retention standing. The agency argued this required a ruling in its favor. See Board File Tab 20.

Appellants did not timely respond and, by Order dated August 22, 1985, they were again ordered to respond by a date certain. They were further advised that failure to respond would be interpreted as an indication that they no longer wished to pursue their appeals and that their appeals would be dismissed for failure to prosecute. See Board File Tab 28. Appellants still did not respond.

By Notice and Order dated September 12, 1985, appellants were advised that their appeals would not be adjudicated on

the merits and would be dismissed for failure to prosecute. Appellants still did not respond.

Thus, appellants Albers and Hodges have twice been ordered to respond to matters fundamental to the resolution of their cases. They have twice been advised that failure to respond would result in dismissal of their appeals. I find that their inaction constitutes a continuing failure to prosecute their appeals and that dismissal is appropriate. 5 C.F.R. § 1201.43(b). See, e.g., Clover v. Department of Transportation, 15 M.S.P.R. 473 (1983) and Bennett v. Department of the Navy, 2 M.S.P.B. 93, 1 M.S.P.R. 683 (1980).

IV. Analysis of the Merits

All five of the other appellants have continued to press their claim that, because the agency failed to properly apply RIF procedures in the first instance, they are now entitled to retroactive reinstatement without any showing that they were prejudiced by the agency's action. For the reasons previously explained in my "Order Denying Motion for Summary Judgment" (Board File Tab 40), their argument is again rejected. Appellants are not entitled to relief unless a determination is made that they would have been retained in a specific position had the RIF been properly conducted.

Samuel J. Jacob

Appellant Jacob was a Field Representative, GS-301-13, with CSA prior to the RIF. He was in subgroup IA and was #14 on the Master Listing. (Board File Tab 39, Agency Exhibit 1). He claimed a right to a GS-13 Field Representative position which was given to Charles Hodges. While at CSA, Hodges occupied the position of Administrative Officer, GS-341-14; his title was Chief, Administrative Management. He was in subgroup IAD and was #2 on the Master Listing. (Agency Exhibit 2).

As a IAD, Charles Hodges clearly had subgroup superiority over appellant Jacob who was only a IA. See 5 C.F.R. § 351.501 (1981). Jacob does not dispute this. He claims, however, that Hodges had no initial right to transfer. Appellant has

never explained the basis for his claim and I am aware of none. The Federal Circuit noted that all CSA employees were identified with a continuing function. 762 F.2d at 984. Moreover, David Mischel, the agency's RIF expert,^{5/} testified that Hodges did have a right to transfer because his function transferred.

Mischel also testified that although Hodges' experience as an Administrative Officer did not necessarily qualify him to be a Field Representative, his prior experiences as Chief, Alaska/Oregon Field Operations Division, definitely did. See Hodges' SF-171 (Agency Exhibit 8). This

^{5/} Mr. Mischel was offered as an expert on RIF procedures in the Federal government. Over objection by appellant Sumida's representative, the Presiding Official found he qualified as an expert.

testimony was un rebutted and I find it sufficient to establish that Hodges was in fact qualified for the Field Representative position. Therefore, it is irrelevant that appellant Jacob may have been more qualified. See, e.g., Madsen v. Veterans Administration, No. 85-528, slip op. (Fed. Cir. Feb. 8, 1985).

I conclude that appellant Samuel J. Jacob was not entitled to the Field Representative position filled by Charles Hodges and that the agency has satisfied its burden to demonstrate that Jacob's substantive RIF rights were not abridged.

Richard Putnam and Charles Van Pelt

Both appellants Putnam and Van Pelt claimed a right to the position of Field

Representative, GS-301-12.6/ The position was actually given to Van Pelt on March 1, 1982, although he was #12 on the Master Listing and Putnam was #11. At the hearing and in its closing argument, the agency conceded that it did not use the Master Listing to fill the position and, if it had, that Putnam would have gotten the position over Van Pelt. The agency maintained, however, that neither appellant actually had a right to the position because both were lower on the Master Listing than two other qualified employees, William Shovell, a Supervisory

6/ In closing argument, the agency maintained that appellant Van Pelt did not claim a right to the position, only to backpay. I do not agree. Van Pelt's claim for backpay was based on several theories, one of which was his claim to the GS-12 Field Representative position. See, e.g., Board File Tab 49.

Field Representative, GS-301-14, who was #4 on the Master Listing and Dwight W. Davis, a Field Representative, GS-301-13, who was #6. See Agency Exhibit 2.

However, the agency submitted no evidence to establish that it was more probable than not that Shovell and Davis would have accepted the position if it had been offered. The only evidence bearing on this point was the testimony of appellant Putnam. Putnam testified that he "thought" Shovell had retired although he did not recall where he had heard that. He testified that Davis told him that he (Davis) took a lower-graded position with the Environmental Protection Agency (EPA) shortly after the RIF, in October or November, 1981. The agency argues that Davis' acceptance of a lower-graded position with the EPA is a "strong

indication" that Davis would have accepted the Field Representative position if it had been offered. It may be an "indication" but I do not find it sufficient to satisfy the agency's burden of proving that appellants' substantive RIF rights were not abridged. See Hill v. Department of Commerce, 25 M.S.P.R. 205, 208 (1984) (once employee shows violation of substantive right, agency must show no adverse effect).

In the absence of more specific evidence regarding the EPA position which Davis accepted, it would be speculative to conclude that he would have accepted the agency's offer. Both were lower-graded positions; the evidence does not reveal the grade of the EPA position. The agency's Field Representative position was

a temporary one; there is no evidence whether the EPA position was temporary or permanent. Likewise, in the absence of any evidence, it would be sheer speculation to conclude that Shovell, formerly a GS-14, would have accepted a GS-12 Field Representative position in lieu of retirement. Thus, I conclude that appellants' claim to the GS-12 Field Representative position is not rebutted by the mere existence of two qualified employees with higher retention standing in the absence of any evidence that those employees would actually have accepted the position if it had been offered.7/

7/ Moreover, the agency would have had to demonstrate that these employees had bumping or retreat rights because they would not have been in the competitive level for GS-12 Field Representatives. Showell was a GS-14 and Davis a GS-13.

The agency presented no evidence to support its "concession" that appellant Putnam's claim to the position was superior to that of appellant Van Pelt. As previously noted, Putnam is carried on the agency's Master Listing as a Program Analyst, GS-345-13. Thus, he would not have been in the competitive level for GS-12 Field Representatives. He would have had rights to the position only if he could have bumped or retreated. He could not have bumped Van Pelt because they were both members of subgroup IA. 5 C.F.R. § 351.703(a)(1) (1981). See Dante v. National Science Foundation, 16 M.S.P.R. 314 (1983) (no right to bump an employee in the same subgroup).

An employee may retreat to a position from or through which he was promoted (or an essentially identical position) and

displace an employee with lower retention standing. 5 C.F.R. § 351.703(a)(2) (1981). See Gallegos v. Department of Defense, 9 M.S.P.B. 467 (1982). There is no evidence in the record of this case that appellant Putnam was promoted to the Program Analyst position from or through a Field Representative position. Mr. Putnam did indicate on his SF-171 (Agency Exhibit 11) that he had been a Senior Field Representative from May, 1977 to May, 1980. He further indicated that he was detailed from the Senior Field Representative position to the Program Analyst position. If he were in fact detailed, then his position of record at the time of the RIF would have been Senior Field Representative, GS-13. See, e.g., Frankel v. Department of Education, 17

M.S.P.R. 453 (1983) (position of record for RIF purposes is appointed position, not position to which employee is temporarily detailed). Since Putnam's Senior Field Representative position was a GS-13, he was still in a separate competitive level from Field Representative, GS-12. See, e.g., Burner v. Tennessee Valley Authority, 20 M.S.P.R. 167 (1984) (error to place positions of different grades in same competitive level). Thus, Putnam still would not have been able to bump Van Pelt.

Thus, I conclude that, contrary to the agency's concession, appellant Putnam did not have a right to the GS-12 Field Representative position given to appellant Van Pelt. Putnam also claimed a right to a GS-12 Field Representative position at agency headquarters in Washington, D.C.

He did not further specify the position. The agency submitted an affidavit from Jacqueline Lemire (Agency Exhibit 20) which stated no Field Representative positions had been filled in headquarters. Thus, I reject this claim by appellant. Putnam also claimed rights to unspecified Field Representative and/or Program Analyst positions in the State of Alaska. The agency did not respond to this claim. I find, however, that appellant did not identify these positions with sufficient specificity to meet his initial burden. See 21 M.S.P.R. at 393-4. He did not indicate where these positions were nor demonstrate that they were occupied by employees with lower retention standing. Thus, I conclude that none of appellant Putnam's substantive rights were abridged.

By process of elimination, I find that appellant Van Pelt was in fact entitled to the GS-12 Field Representative position which he was given on March 1, 1982. He was a GS-12 Field Representative with CSA and is the first qualified eligible on the agency's Master Listing who would have been in the proper competitive level for the position. I also find that he was entitled to the position retroactive to October 1, 1981.

Donald Wright

Appellant Wright was a Public Affairs and Congressional Relations Officer, GS-1081-13, with CSA. He was a IB and #21 on the agency's Master Listing. He claimed rights to two secretarial positions. The first was Secretary (Typing), GS-7, which was given to Alice F. Fabre, who was #23

on the Master Listing. The second was Secretary (Typing), GS-6, which was given to Romelle Williams, who was #24. Both were in subgroup IB. See Agency Exhibit 2.

Agency witness David Mischel testified that appellant was not qualified for secretarial positions above the GS-5 level because he lacked the necessary qualifying experience. Mischel testified that the qualification standards published by the Office of Personnel Management^{8/} require that a candidate for secretarial positions above the GS-5 level have at least six months prior experience as a secretary at the next lowest grade. For

^{8/} See Handbook X-118, "Qualification Standards for Positions Under the General Schedule" (Jan. 1980) for Secretary Series, GS-318.

positions above GS-5, academic credit may not be substituted for qualifying experience. Appellant cross-examined Mischel regarding all the prior work experiences listed on his SF-171. See Agency Exhibit 15. Mischel responded that each of appellant's prior positions was essentially professional in nature, with some minor clerical responsibilities, but none was a real secretarial position. Appellant did not dispute that he had not held any prior secretarial positions.

Appellant did maintain that his prior experience was qualifying, regardless, because the standards actually require that "[a] candidate must have had six months of qualifying experience at GS-5 in the General Schedule or equivalent experience outside the General Schedule." (emphasis added). Appellant argues that

the emphasized language allowed consideration of non-secretarial positions as qualifying experience. I do not read it that way. I interpret the language to require that the equivalent experience outside the General Schedule" be secretarial in nature. The agency demonstrated that both employees who obtained the positions appellant was claiming did, in fact, have the requisite prior secretarial experience. See Agency Exhibits 16 and 17. Moreover, Mischel testified that even if appellant's prior employment was considered as generally qualifying, there was no evidence that he had experience in organizing the flow of clerical processes in an office or in organizing and designing a filing system,

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both of which are required for secretarial positions at the GS-5 level and above.

Based on the foregoing, I conclude that appellant Wright was not qualified for a GS-6 or GS-7 secretarial position. 5 C.F.R. § 351.701(a) (1981). Even if he were, he could not have bumped Fabre or Williams since they were in appellant's subgroup IB. See Burner v. Tennessee Valley Authority, 20 M.S.P.R. 167 (1984). Thus, his substantive rights were not abridged.

Floye N. Sumida

Appellant Sumida held the position of Attorney-Advisor, GS-905-14, with CSA in Region X. Her title was Regional Counsel. It is undisputed that the entire legal function of CSA was transferred to OCS at agency headquarters in Washington, D.C.

The agency established four attorney positions there, two permanent and two temporary. The two permanent positions were filled from the agency's Master Listing. Alfred J. Harris, #1 on the Master Listing was given a GS-14 position and Wayne W. Waldo, #4, was given a GS-15 position. The two temporary positions were not filled from the Master Listing.^{9/} Spencer L. Lott, #11, and John C. Meyer, #24, were given the temporary positions at a GS-15 level. See Agency Exhibit 4.

Appellant was #10 on the Master Listing. Through various theories, she

^{9/} According to agency witness David Mischel, the agency did not fill them from the Master Listing for two reasons. First, it was assumed that RIF regulations did not apply to temporary positions and, second, it was determined that the work would not be limited to transferred functions.

claimed rights to all positions except that given to Waldo. She first claimed that she was entitled to the two temporary positions filled by Lott and Meyer because she was higher on the Master Listing. She argued that although the agency erroneously developed a single retention list for all attorneys without regard to competitive level, both the Board and the Federal Circuit refused to invalidate it. She maintained that the Federal Circuit remanded for the sole purpose of allowing appellants to demonstrate that they were entitled to a position which was given to another employee with a lower standing on the agency's list. Thus, the agency had, in effect, created one competitive level for all attorneys and the inquiry had to be confined to it. I have already rejected this argument in my "Order

Denying Motion for Summary Judgment." See Board File Tab 40. I find that both the Board and the Court remanded these cases for the purpose of determining whether any appellants had been deprived of a position which they would have gotten had a proper RIF been conducted in the first instance. That requires a reconstruction of the RIF to the extent necessary to determine the rights of each individual appellant.

Under RIF regulations, appellant would not have been entitled to the GS-15 positions given to Lott or Meyer because she was a GS-14. Positions at different grade levels are required to be in different competitive levels. Burner v. Tennessee Valley Authority, 20 M.S.P.R. 167, 170 (1984). An employee has no right

of assignment to a higher-graded position during a RIF. 5 C.F.R. § 301.704(b)(1) (1981). See Mello v. Department of Energy, 20 M.S.P.R. 45, 47 (1984). Appellant also argued that the agency's classification of attorneys as GS-14 or 15 was arbitrary and capricious. Absent a general attack on the bona fides, classification issues are not cognizable in RIF appeals. See, e.g., Apodaca v. Department of Education, 19 M.S.P.R. 540, 544-5 (1984).

Appellant maintained she was entitled to the position given Alfred Harris because Harris was promoted from GS-13 to GS-14 on August 23, 1981, two days after the specific RIF notice was issued. Appellant argued that 5 C.F.R. § 351.703(b) requires that competitive levels be determined as of the date of the specific

RIF notice, not the effective date of the RIF itself. Section 351.703(b) provides:

Each employee's assignment rights shall be determined on the basis of the pay rates in effect on the date of issuance of specific notices of reduction in force, except that when it is officially known on the date of issuance of notices that new pay rates have been approved and will become effective by the effective date of the reduction in force, assignment rights shall be determined on the basis of the new pay rates.

Although not totally clear, I find that this regulation was intended to apply to hourly-paid employees and/or determinations as to the "best offer" for assignment purposes. See Federal Personnel Manual, Chapter 351, Subchapter 2, §4-4c. (July 7, 1981). There is no general prohibition against changes in competitive levels after issuance of the specific RIF notice but prior to the effective date of

the RIF. See Holliday v. Department of the Army, 11 M.S.P.B. 14 (1982) (removing positions from competitive level permissible prior to effective date of the RIF). See also Coleman v. Tennessee Valley Authority, 23 M.S.P.R. 670 (1984).

I find that competitive levels are to be determined as of the date of release therefrom in accordance with 5 C.F.R. § 351.506(a). That regulatory subsection provides that the "retention standing of each employee released from his competitive level ... is determined as of the date he is so released." Although the regulation is specifically directed at retention standing, I find that it a fortiori applies to competitive levels. Thus, the agency properly considered Alfred Harris a GS-14 as of the effective

date of the RIF and, since he was a member of subgroup IAD, he had superior rights to appellant who was subgroup IA. 5 C.F.R. § 351.501(a) (1981).

Appellant also argued that she had a right to the position occupied by John Meyer because the agency never definitely established when he was promoted to GS-15. She based her argument on two computer printouts generated by the agency prior to the RIF (August 22 and September 24, 1981), both of which reflect Meyer as a GS-14. See Board File Tab 42, Exhibits 11A and B and 12A and B. I ascribe little or no significance to these printouts. I assume they are the result of administrative oversight. A Standard Form 50, "Notification of Personnel Action," establishes Meyer's promotion date as July 5, 1981. Agency witness David Mischel

testified that July 5, 1981, was the correct date. There is no probative evidence to the contrary. Thus, appellant's argument in this regard is not well taken.

I find no evidence that appellant Sumida's substantive entitlements were infringed. Even if I had, the agency submitted evidence that three GS-905 attorneys who were higher on the Master Listing had appealed their separations. See testimony of David Mischel. These individuals were Franklin G. Moffitt (#7), P. Vaugh Gearan (#8), and Betty G. Kauffman (#9). Moffit and Gearan were GS-15's and Kaufman was GS-14. The fact that they appealed would, in my view, satisfy the agency's burden to demonstrate that these employees would have accepted

positions if offered. Thus, even if appellant had shown that the agency erred in regard to her substantive entitlements, it is likely that the agency could have shown that the error did not affect appellant's substantive rights. See Hill v. Department of Commerce, 25 M.S.P.R. 205, 208 (1984).

Appellant attacked the bona fides of the RIF.^{10/} See Losure v. Interstate Commerce Commission, 2 M.S.P.B. 361, 2 M.S.P.R. 195 (1980). Appellant pointed to the alleged arbitrary or inaccurate classification of attorneys. However, even assuming that such misclassification

^{10/} The Board found that the transfer of function was sufficient to satisfy the agency's initial burden to show the need for the RIF. 21 M.S.P.R. at 393.

existed, appellant has made no showing whatsoever that it was the result of improper design or ill motive toward her. In fact, appellant herself testified that Regional Counsel, like herself, were hired at different levels because of budgetary considerations. Early hirings by one individual were at the GS-15 level but later hirings by another were at GS-14. This in no way undermines the bona fides of the RIF.

Appellant also points to the promotions of Meyer (July 5, 1981), Lott (July 12, 1981), and Harris (August 23, 1981) immediately preceeding or during the RIF. Again, however, appellant has made no showing that the promotions were not deserved nor that they were made for the purpose of affecting her entitlements. While the timing would clearly be suspect

under other circumstances, here agency officials at the time were operating on the assumption that CSA was going to be abolished and that RIF regulations were not applicable to any rehiring.

Finally, the agency's failure to observe retention standing in the hiring of two temporary attorneys was explained to my satisfaction. See infra at 9, n. 9. I find no evidence of bad faith from the fact that agency officials chose to exercise selection discretion which they reasonably, but mistakenly, believed they had. I conclude that appellant's attack upon the bona fides is largely suspicion and surmise and there has been no showing that the RIF was conducted in bad faith or for improper personal motives.

Appellant Sumida argued that the RIF violated the requirement of Executive Order 11478 which requires that equal employment opportunity through affirmative action be "an integral part of every aspect of personnel policy and practice" in the Federal government. The factual basis for her claim was that all four attorneys hired were white males. Her argument is not well taken. I am aware of no law, rule, or regulation which requires an agency to incorporate affirmative action directives into a RIF. To the contrary, the Board has noted that equal employment opportunity factors may not be considered. See Drucker v. Department of the Interior, 13 M.S.P.B. 104, 105 (1983).

IV. Order

Accordingly, it is ORDERED that the appeals of John P. Albers and Charles W. Hodges are DISMISSED. It is ORDERED that the agency's RIF action is SUSTAINED as to appellants Jacob, Putnam, Wright, and Sumida.

It is ORDERED that the separation of appellant Charles Van Pelt is NOT SUSTAINED. It is further ORDERED that the agency correct its records to effect cancellation of his separation and reinstate him with backpay and benefits retroactive to October 1, 1981.

APPEAL RIGHTS

This initial decision of the Merit Systems Protection Board will become a final decision of the Board on December 4, 1985, unless a petition for review is

filed by that date or the Board reopens the case on its own motion. 5 C.F.R. §§ 1201.113 and .117 (1985). Any party or the Office of Personnel Management may seek to have the decision reviewed by the Board by filing a petition for review with:

Office of Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. § 1201.114 of the Board's regulations. (It is not necessary to serve the Regional Office.) Parties should note that, pursuant to recent amendments effective 1 August 1985, they are now required to serve any petition for review and any subsequent pleadings on all other parties. A copy of these important amendments is attached to this decision. For additional information

see 50 Fed. Reg. 28895. The petition for review must be filed on or before December 4, 1985, and must set forth objections to the initial decision, supported by references to applicable laws, regulations and the record.

If appellant chooses to contest the Board's final decision (s)he may, if the court has jurisdiction, obtain judicial review of the Board's final decision by filing a petition with:

United States Court of Appeals
for the Federal Circuit
717 Madison Place N.W.
Washington, D.C. 20439

Such a petition must be received by the court within thirty (30) days of the final Board decision. 5 U.S.C. § 7703(b)(1).

ENFORCEMENT

Any party seeking enforcement of a final decision must file a petition for

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enforcement with this office in accordance with 5 C.F.R. § 1201.181.

ATTORNEY FEES

When the appellant has prevailed, (s)he may request payment of attorney fees. Any such request must be filed with this office within 10 days of the date this decision becomes final. 5 C.F.R. §1201.37.

FOR THE BOARD:

John W. Tapp
Presiding Official

MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE
150 CAUSEWAY STREET, ROOM 1122
BOSTON, MASSACHUSETTS 02114

RAYMOND C. AHLBERG,
et al,

v.

DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

CASE NUMBER:
See Appendix

ORDER

On June 18, 1984, the Board remanded to the Boston Regional Office the appeals of the appellants listed in the attached appendix. As reflected in the Board's opinion and order, each appellant must assert that he was identified with a continuing function transferred to the Office of Community Services (OSC) and must further identify a position or positions for which he was qualified that have

been assigned to other employees with less retention standing or positions occupied by employees who had an initial entitlement to transfer. See Opinion and Order at 21-22. Absent such assertions, an appeal will be dismissed for failure to prosecute. Cf. Debold v. Department of the Navy, 9 MSPB 95, 96 (1980) (appellant had a burden to identify an alleged impropriety in the application of RIF regulations with sufficient specificity to enable the agency to address contested matters in its presentation of evidence).

Accordingly, each APPELLANT named in the attached appendix is hereby afforded until September 14, 1984 in which to provide the presiding official with the

required information^{1/}. Any such submission will be considered so long as filed by first class mail or personal delivery by that date, accompanied by certificate of service on the agency representative (see attached service list or address). Where an appellant fails to provide the requested information, the record will close on September 14, 1984 and his appeal will be dismissed with prejudice.

Further, if any appellant chooses someone as a representative, that APPELLANT is ordered to promptly submit a Designation of Representative Form

^{1/} These appeals have been consolidated for processing at this stage only. Consolidation at subsequent stages are subject to motion by a party or the presiding official. 5 C.F.R. §1201.36.

(enclosed) naming that person. Until such a designation is received, the presiding official will not serve any materials on anyone but the appellant. Remember, the agency must be served a copy of the appellant's designation.

The AGENCY is ordered to make available all pertinent documents requested by appellants seeking to establish a valid claim to a continuing position with OCS. Each appellant on the attached service list must be notified in writing, no later than August 30, 1984, where this documentation is located. In addition, the agency must make this material available for inspection and

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copying during normal business hours. See
Opinion and Order at 23, n. 29.

JOHN F. MARKUNS
Presiding Official

Date

ENCLOSURE:

Designation of Appellant's Representative
Form (for each appellant)

APPENDIX

Ahlbert, Raymond C.	BN03518210134REM
Cooper, Marilyn	0035REM
Cooper, Sylvia	0033REM
Cox, William	0028REM
Cummings, Thomas	0025REM
Day, Walter	0038REM
Faye, Lawrence	0021REM
Hayes, Beverly	0037REM
Janey, Kenneth	0040REM
Kaufman, Betty	0039REM
Kelly, Edmond	0024REM
Kelly, Lawrence	0029REM
Kirrane, Michael	0023REM
Leen, Arthur	0018REM
Negron, Hamed	0041REM
Newton, Nelson	0132REM
Shields, Anne	0031REM
Tierney, Mary	0026REM
Vyse, Elaine	0022REM
Williams, Cheryl	0019REM

**MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE
150 CAUSEWAY STREET, ROOM 1122
BOSTON, MASSACHUSETTS 02114**

RAYMOND C. AHLBERT,
et. al
(SEE APPENDIX)

V.

DEPARTMENT OF HEALTH
AND HUMAN SERVICES

CASE NUMBER:
SEE APPENDIX

ORDER

As the parties are aware, the United States Court of Appeals for the Federal Circuit has lifted the stay of proceedings. Accordingly, processing will now continue.

1. All outstanding discovery must be completed no later than August 2, 1985. Any prior motions to compel must be renewed, if still necessary.

2. Appellants are hereby afforded to and including August 9, 1985 to file a full and complete response to the Board's August 14, 1984 order (attached).^{1/} All other provisions of this order remain in effect. Thus, a failure to file an adequate response will result in dismissal of this appeal with prejudice.

3. A hearing notice is enclosed. A hearing, if needed, will take place on August 29 and 30, 1985. A hearing will be held on for those appellants who provide

^{1/} The second sentence of this order is corrected as follows:

As reflected in the Board's opinion and order, each appellant must assert that he was identified with a continuing function transferred to the Office of Community Services (OCS) and must further identify a position or positions for which he was qualified that have been assigned to other employees who had [an] no initial entitlement to transfer.

the information required by the August 14, 1984 order.

4. There will be no postponements or extensions absent the most extraordinary circumstances. The Board deadline for issuance of initial decisions in these cases is September 30, 1985.

5. The motion for substitution filed in relation to appellant Janey's petition for appeal is GRANTED.

JOHN F. MARKUNS
Presiding Official

Date

Enclosures

MERIT SYSTEMS PROTECTION BOARD
BOSTON REGIONAL OFFICE
150 CAUSEWAY STREET, ROOM 1122
BOSTON, MASSACHUSETTS 02114

_____)	
)	
BEVERLY HAYES, et al.	)	CASE NO.
Appellant,	)	BN3518210037-1
)	
v.)	
)	
DEPARTMENT OF HEALTH)	
AND HUMAN SERVICES,)	
_____)	

ORDER

I HEARING POSTPONEMENT

This confirms telephone notice to the parties that the hearing scheduled on September 17 and 18, 1985 has been POSTPONED.

II MOTION FOR SUMMARY JUDGEMENT

Appellants' motion for summary judgement is premised on the following:

1. As reflected in the decision of the Federal Circuit Court of Appeals the

agency has conceded that all former CSA employees were identified with transferred functions.

2. Both the Board and the court ruled that the agency was required to follow proper reduction-in-force procedures and that the procedures used by the agency were not in accordance with 5 C.F.R. Part 351.

3. The Board, in Hill v. Department of Commerce, MSPB Docket No DC03518210663 (December 11, 1984), ruled that once an appellant shows his separation occurred in violation of proper reduction-in-force procedures, the appellant is entitled to remedy unless the agency, bearing the burden of proof, establishes that the appellant would n have

been retained had a proper reduction-in-force been carried out.

4. The agency cannot prove that each appellant would not have survived a proper reduction-in-force, had the agency carried one out, because the agency claims that it does not have the required position descriptions and therefore cannot reconstruct proper competitive levels.

Based on these assertions, appellants maintained they are entitled to summary judgement, cancellation of the reduction in force actions, reinstatement and backpay.

On the other hand, the agency contends that the agency was not required to follow traditional reduction-in-force procedures after identifying employees with a transferred function. The agency argues that the Board and the court

sanctioned its use of a "master retention list."

Upon careful consideration of each side's arguments, I must reject the legal positions of both parties. The agency has ignored the express finding of the court that the agency's reliance on a master list ...

did not satisfy the requirements of traditional reduction in force registers, since they did not show the competitive levels of each employee, 5 C.F.R. §351.403 (1984), and there were no separate retention registers for each competitive level, 5 C.F.R. §351.401 (1984)

726 F.2d 978, 984 (Fed. Cir. 1985). The court then went on to approve the procedure established by the Board which allowed affected employees the opportunity

to show there was a position to which he or she could claim entitlement. Once this burden of production was met the burden of persuasion then shifted back to the agency to refute this showing.

The appellants' reading of Hill is unwarranted to the extent they maintain that the Board's and the court's ruling in this case is inconsistent with it. In Hill, the Board held:

Because the agency must prove by a preponderance of the evidence that it afforded all rights to which an employer is substantively entitled, in some cases where an issue is raised regarding an error in RIF procedures from which substantive rights are derived, the burden is on the agency to prove by preponderant evidence that such error had no adverse effect on the employee's substantive entitlements. (Emphasis added).

Nothing in Hill prevents the Board from requiring a employee, in an

appropriate case, to assert sufficient facts to show that an agency violation of RIF procedures affected his substantive rights. Accordingly, I conclude that appellants' motion, insofar as it is based on a purported failure of proof on the agency's part, must be and is DENIED.

III SUFFICIENCY OF APPELLENTS'
INDIVIDUAL CLAIMS

A. Betty Kaufman

Ms. Kaufman claims entitlement to Attorney-Examiner positions occupied by Mr. John C. Meyer and Mr. Spencer L. Lott. The agency contends that she is entitled to neither position because these positions "were temporary, and were not required to be filled in order from the Preference Order Master Listing". As discussed above, the use of a master listing was rejected by the Board and the

court. Moreover, under RIF procedures, an employee may be entitled to assignment to a temporary position, if filled by a competing employee, so long as it is a position for which he is qualified and which will last at least 3 months. See 5 C.F.R. §351.603 (1981).

Nevertheless, the information provided by the agency in response to appellant's interrogatories indicates that Mr. Meyer and Mr. Lott were assigned GS-15 positions, while Ms. Kaufman held a GS-14 position at CSA. I am aware of no law or regulation which entitles an employee to a promotion in a reduction in force. Rather, an employee is entitled to assignment to a position with no reduction or the least possible reduction in grade. See 5 C.F.R. §351.703 (1981).

If the information regarding the positions occupied by Messrs. Meyer and Lott is inaccurate, and Ms. Kaufman can still assert facts sufficient to show entitlement to a position, then a hearing may still be warranted. Otherwise, I propose to dismiss her appeal for failure to prosecute. A response from appellant Kaufman will be considered so long as filed by October 1, 1985. If appellant files additional information or argument and believes she is still entitled to a hearing, then her representative must follow the instructions contained in "Rescheduling the Hearing" below.

B. HAMED NEGRON

Appellant Negron claims he was entitled to the position of Outplacement Coordinator, GS-0301-13, which was occupied by Mr. Edmond Kelly. However,

appellant Negron was a GS-12 while employed at CSA. I am aware of no law or regulation which entitles an employee to a promotion in a reduction in force. Rather, an employee is entitled to assignment to a position with no reduction or the least possible reduction in grade. See 5 C.F.R. §351.703 (1981).

If this information regarding the position occupied by Mr. Kelly is inaccurate and Mr. Negron can still assert facts sufficient to show entitlement to a position, then a hearing may still be warranted. Otherwise, I propose to dismiss his appeal for failure to prosecute. A response from appellant Negron will be considered so long as filed by October 1, 1985. If appellant files additional information or argument and

believes he is still entitled to a hearing, then his representative must follow the instructions contained in "Rescheduling the Hearing" below.

C. BEVERLY HAYES

Ms. Hayes occupied a Field Representative, GS-301-13, position at CSA. She belongs to Group I, subgroup B. She claims entitlement to the Outplacement Coordinator, GS-301_13, position occupied by Mr. Kelly. Information provided by the agency indicates that Mr. Kelly was a Field Representative, GS-301-13, at CSA. Ms. Hayes belongs to Group II and her subgroup is A. Inferring that Ms. Hayes and Mr. Kelly were both qualified for the Outplacement Coordinator position by virtue of their experience in the Field Representative position by virtue of their experience in the Field Representative

position, it appears appellant Hayes was entitled to occupy the position given to Mr. Kelly because Mr. Kelly was in a lower subgroup. See Federal Personnel Manual (FPM), Chapter 351, Subchapter 4, Section 4-3.

The agency has not contended that the Outplacement Coordinator position lasted less than three months, that appellant Hayes were not qualified for it or that she was not entitled under traditional RIF procedures to occupy the position. If the agency contends that Ms. Hayes is not qualified for this position or otherwise is not entitled to it, it must set forth its reasons in writing and file this submission, accompanied by a certificate of service on appellant's representative, no later than October 1, 1985. In

addition, the agency must then follow the procedure described under the section entitled "Rescheduling Hearing" set out below.

If the agency fails to respond I will not hold a hearing in Ms. Hayes's case. Rather, I will find that she was qualified to occupy the Outplacement Coordinator position by virtue of her experience in the Field Representative position and was entitled to placement in the position by virtue of her superior retention standing.

D. KENNETH JANEY

Mr. Janey occupied a Field Representative, GS-301-12, position while at CSA. He first claimed settlement to the Outplacement Coordinator, GS-301-13, position occupied by Mr. Kelly. However, for the same reasons discussed above in Mr. Negron's case, I find no basis for

appellant's claim of entitlement to this position.

Appellant's next claim is entitlement to a secretary (typing), GS-318-7 position occupied by Ms. Anna Haley. Mr. Janey belonged to Group I, subgroup A, while Ms. Haley belonged to Group I, subgroup B. The agency contends that appellant Janey was not qualified for the position based on his SF-171 which shows his typing skills as 20 words per minute. The minimum FPM qualification standards for the Secretary (Typing), GS-318-7 position incorporate the qualification standards of the Clerk-Typist, GS-322 series. The minimum qualification requirements at entry level (GS-2) require a minimum of forty standard words per minute.

If any of the essential information relied on above is inaccurate and appellant can still assert facts sufficient to show entitlement to a position, then a hearing may still be warranted. Otherwise, I propose to dismiss appellant's appeal for failure to prosecute. A response from appellant Janey will be considered so long as filed by October 1, 1985. If appellant files additional information or argument and believes he is still entitled to a hearing, then his representative must follow the instructions contained in "Rescheduling the Hearing" below.

IV RESCHEDULING THE HEARING

If any party believes a hearing is still warranted in connection with any submission filed pursuant to the foregoing, then the representative for that

party should contact the presiding official by telephone no later than October 1, 1985 to request a hearing date. I will then contact the other side to negotiate a date. The only dates available are October 16, 17, and 21. The Board deadline for issuance of initial decisions in these cases is October 31, 1985.

For the Board:

JOHN F. MARKUNS
Presiding Official

Date: _____

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

CERTAIN FORMER CSA	)	Misc. Docket No. 42
EMPLOYEES,	)	and
)	
Petitioners,	)	Appeal No. 85-501
	)	(Petition for Writ
v.	)	of Mandamus)
)	
DEPARTMENT OF)	
HEALTH & HUMAN)	
SERVICES,)	
)	
Respondent.	)	MSPB Docket No.
	)	AT03518210251

DECIDED: May 20, 1985

Before FRIEDMAN, KASHIWA and NEWMAN, Circuit Judges. FRIEDMAN, Circuit Judge.

These appeals and a petition for mandamus raise various questions concerning the removal from the Community Services Administration of all of its employees in a reduction-in-force resulting from the abolition of that agency and the transfer of some of its functions and employees to

a new agency, the Office of Community Services. The Merit Systems Protection Board (Board) upheld the removal but gave the individual employees the opportunity to show that they were entitled to occupy the positions at the new agency instead of other former Community Services Administration employees who had been appointed to those positions. We affirm the Board, and deny the petition for mandamus.

I

For many years the Community Services Administration administered the grants under the anti-poverty program that the federal government made to community action agencies in the states. The Community Services Administration made the grants directly to those agencies and closely controlled and supervised both the making

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR
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IF AND WHEN A BETTER COPY CAN BE
OBTAINED, A NEW FICHE WILL BE
ISSUED.

of grants and the agencies' spending of the money. It did this to insure compliance with detailed federal standards governing the grants. The Community Services Administration was an independent agency, which in September 1981 had more than 900 employees.

In August 1981, in the Omnibus Budget Reconciliation Act of 1981 (Budget Reconciliation Act), Pub. L. No. 87-35, 95 Stat. 357 (1981), Congress made a major change in the federal anti-poverty program. In place of the prior practice under which the federal government selected the grant recipients and closely supervised their compliance with detailed federally prescribed standards, Congress provided that beginning October 1, 1981, federal anti-poverty funds would be distri-

buted through block grants to the states. The states would determine the basis upon and the agencies to which those funds would be distributed and would be responsible for supervising the proper implementation of the grants. Apart from making the grants to the states, federal involvement in the program would be minimal.

The Budget Reconciliation Act terminated all funding of the Community Services Administration as of September 30, 1981. The Act created a new agency in the Department of Health and Human Services (the Department), the Office of Community Services. The new agency would handle the anti-poverty program on the block-grant basis and also would perform

certain functions of the Community Services Administration that would be continued during a transitional period. In describing these arrangements, the Conference Committee Report on the Budget Reconciliation Act stated:

The conferees emphasize that the Community Services Administration, as an agency, is terminated and that the Community Services Block Grant is clearly a new program within the Department of Health and Human Services, not a transfer of authority.

H.R. Con. Rep. No. 208, 77th Cong., 1st Sess. _____, _____, reprinted in 1981 U.S. Code Cong. & Ad. News 1010, 1129.

The President signed the Budget Reconciliation Act on August 13, 1981. Two weeks earlier the Director of the Community Services Administration had distributed to all employees at the agency a general reduction-in-force notice, which

stated that that the President had requested no funding for the agency for the next fiscal year beginning October 1, 1981, that the agency might terminate, and that the employees' jobs might end on September 30, 1981. The notice included general information about reductions-in-force.

On August 21, 1981, the Community Services Administration sent specific reduction-in-force notices to all employees. The notice stated that because the agency had received no funding for the next fiscal year, all positions there were abolished, that no positions were available for re-assignment, and that the employees would be separated as of September 30, 1981. On the latter date:

(1) All Community Services Adminis-

stration employees, other than those who had resigned in the last two days (to protect their severance pay), were separated pursuant to the reduction-in-force;

(2) The Office of Community Services was established as an operating division in the Department. The Department determined that the new office would need 165 employees during its first year of operation to handle the functions that would be transferred to it.

On September 12, 1981, a union representing Community Services Administration employees filed a suit in the United States District Court for the District of Columbia to require the Department to fill the positions in the Office of Community Services with employees of the Community Services Administration. The union con-

tended that all the functions of the old agency would be transferred to the new agency and that under the statute governing the rights of employees of an agency, functions of which were transferred to another agency, 5 U.S.C. § 3503 (discussed infra, p. 10), the employees of the old agency were entitled to transfer to the new agency. The district court entered a temporary restraining order on September 22, 1981, and a preliminary injunction on October 13, 1981. National Council of CSA Locals, American Federation of Government Employees (AFGE) AFL-CIO v. Schweiker, 526 F. Supp. 861 (D.D.C).

The court held that "Congress has not exempted the transfer of anti-poverty pro-

grams from the Community Services Administration to the Department of Health and Human Services . . . from the coverage of" 5 U.S.C. § 3503, and that the Secretary therefore "must select any employees pursuant to the preferences accorded under" the latter statute. It permanently enjoined the Secretary "from selecting employees to administer the former Community Services Administration programs without giving preferences as required by" section 3503. Id. at 866. The court further held that the determination "whether there has been a transfer of functions from CSA to HHS and/or a transfer of functions of former CSA employees to HHS" should be made in the first instance by the Secretary, subject to review by the Board. Id. at 864.

The Secretary determined that four functions had been transferred from the Community Services Administration to the Office of Community Services: The close out of the Community Services Administration operations, the work of the Inspector General, certain discretionary programs and the loan fund activities. The Secretary "further determined that [the] block grant and transition activities were new programs of OCS, and, therefore, with respect to those activities no transfer occurred." (Stipulation No. 23)

The Secretary also determined that "all former [Community Services Administration] employees were identified" with the transferred functions.

The Department filled the 165 positions in the Office of Community Services

covering the functions the Community Services Administration had performed in the following manner:

Because of the inadequate job descriptions and other defects in the records of the Community Services Administration and the dispersal of the employees of that agency, the Department could not reconstruct exact reduction-in-force priority registers for the Community Services Administration employees or determine the exact priorities among those employees for the new positions in the Office of Community Services. It therefore established master retention lists that ranked each permanent Community Services Administration employee according to veterans preference rights and dates of service. Separate lists were made for different types

of appointments (competitive or excepted services) and competitive areas (headquarters and each regional office).

The Department then offered permanent appointments for each position in the Office of Community Services that was associated with a transferred function. The offers were made to those employees who had the highest retention standing on the master list. Employees who accepted the offers were treated as restored to duty as of October 1, 1981, and were given backpay from that date. Employees who rejected the offer or who did not receive any offer because of their lower position on the master retention list were placed upon the Department's reemployment priority list.

Employees of the Community Services

Administration who had not been selected under this procedure appealed their September 30, 1981 dismissals to the Board. They contended that because the Community Services Administration had not complied with 5 U.S.C. § 3503 and the implementing regulations, 5 C.F.R. §§ 351.301-03 (1982), the entire reduction-in-force was invalid; that under that statute each of them should have been transferred to the Office of Community Services when the Community Services Administration was abolished on September 30, 1981; and that they were entitled to reinstatement with backpay to positions with the Office of Community Services, which they could hold until the latter agency terminated them pursuant to a proper reduction-in-force.

Several of these employees moved the

Board, under 5 C.F.R. § 1201.27 (1982), to hear the appeals as a class action or, alternatively, to consolidate their appeals with those of the other former employees. The Board refused to hear the appeals as a class action, but granted a limited consolidation to determine those "common issues of law and fact which [were] national in scope." It referred the appeals to its chief administrative law judge for an initial decision on those issues.

After a hearing, the administrative law judge held that all former employees had transfer rights because all the functions of the Community Services Administration, including the transition and block grant functions, had been transferred to the Office of Community Services

or, alternatively, because the latter had replaced the former in performing those functions. He also determined that the Department did not use either or the prescribed methods for identifying competing employees with a transferring function, as 5 C.F.R. § 351.303(c) and (d) (1984) require, and that as a result the Department "did not accord the appellants their substantive rights when it effected the reduction in force." The judge concluded, however, that "[s]ince it is virtually impossible in this case to reconstruct a properly administered reduction in force on a retroactive basis for the purpose of ascertaining the relative retention standing of [the] employees, . . . the Board should ratify the . . . RIF procedure" the Department actually used.

The Board granted review and modified the decision. Although the Board agreed that the transition function had been transferred, it held that there was "insufficient credible evidence to support" the conclusion "that the 'block grant' function [was] transferred." The Board further ruled that "the ALJ erred in his alternative finding that the employees were entitled to transfer of function rights under 5 U.S.C. § 3503(b)."

The Board noted that "[t]here is no dispute that upon invoking the transfer of function procedures, the agency failed to utilize either of the permissible methods of identification." "Accordingly," the Board concluded, "the agency was remiss in meeting the responsibilities and obligations imposed by the regulations."

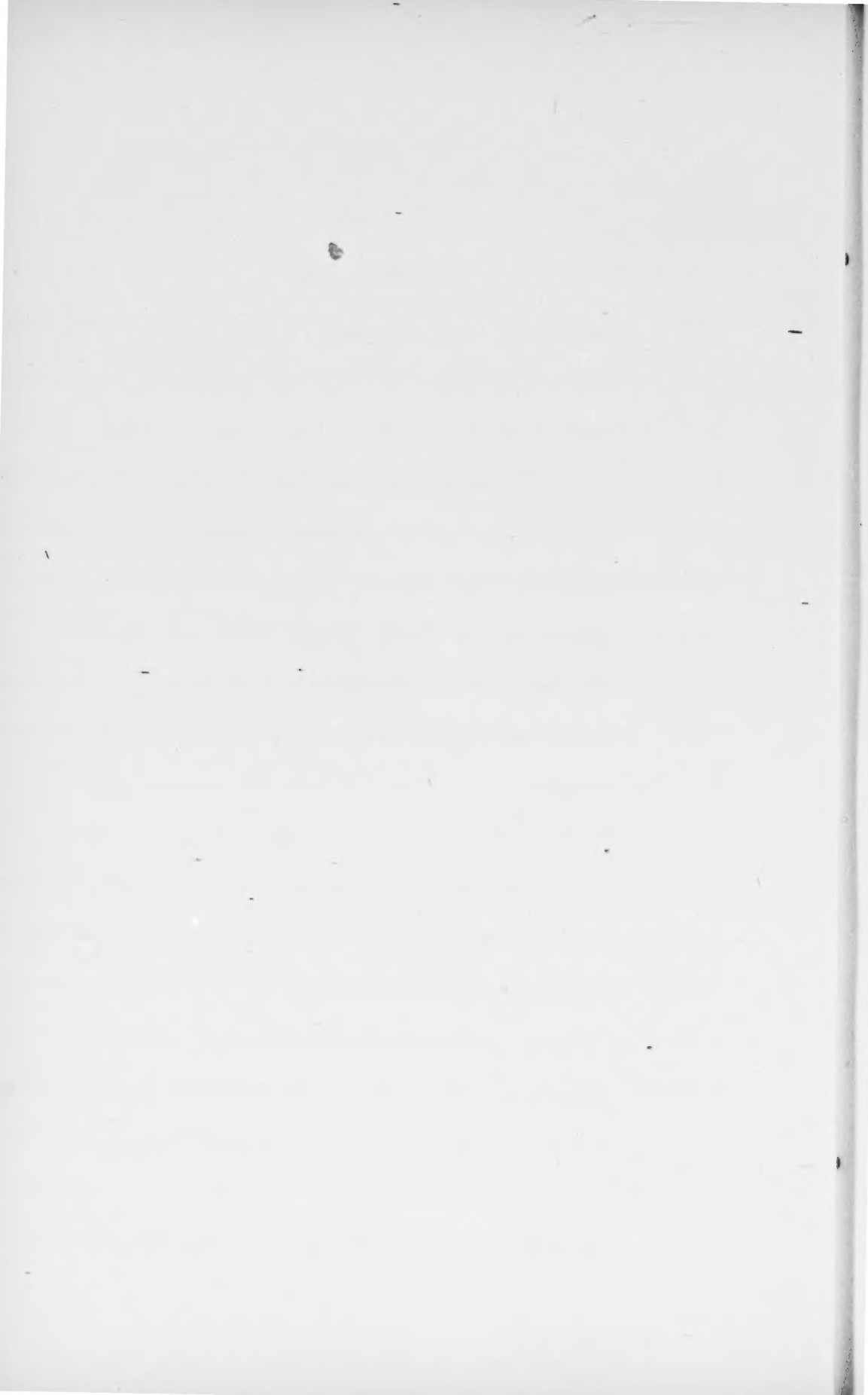
The Board determined, however, that this defect in the proceedings "does not warrant unconditional reversal of the entire reduction in force." Instead, the Board remanded the case for further hearing to enable each employee "to assert that he was identified with a continuing function," and "identify a position . . . assigned to [an]other employe[e] with less retention standing or . . . occupied by [an] employ[ee] who had no initial entitlement to transfer." "Should an [employee] present evidence that tends to establish that he was denied retention to which he was otherwise entitled . . . and the agency is unable or unwilling to refute such evidence by showing it to be untrue

or that his retention standing would not have provided such benefit, the [employee] would prevail."

Subsequently, the Board decided appeals by other former Community Services Administration employees who were not parties to the consolidated cases. In those cases the Board essentially reiterated its decision in the consolidated cases.

II

In No. 42 Misc., the petitioners challenge the decision of the Board on the "common issues of law and fact" described above. The government has moved to dismiss this appeal. It contends that since the Board remanded the case to permit each discharged employee to show that he had a higher retention right to a position in the



Office of Community Services than the former Community Services Administration employee selected for the position had, there is no "final order or final decision" of the Board that we have jurisdiction to review under 28 U.S.C. § 1295(a) (9) (1982).

At least one of the petitioners, however, Ms. Wilkerson, has "abandoned any claim to relief under standards announced by the Board's order," choosing "instead to stand solely on dispositive claims common to all CSA employees." The Board's decision is therefore final as to her, and we clearly have jurisdiction to review it. At oral argument, the government conceded that we could resolve all the questions presented in No. 42 Misc., in Ms. Wilkerson's appeal. In these circumstances

there is no occasion to determine whether, in the absence of that appeal, we would have jurisdiction to review the Board's decision at this stage of the case.

III

Section 3503 of Title V of the United States Code (1982) provides:

(a) When a function is transferred from one agency to another, each competing employee in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

(b) When one agency is replaced by another, each competing employee in the agency to be replaced shall be transferred to the replacing agency for employment in a position for which he is qualified before the replacing agency may make an appointment from another source to that position.

Subsection (a) thus requires that, when there has been a transfer of functions from one agency to another, an employee of the

transferring agency shall be transferred to the receiving agency for employment "in a position for which he is qualified" before the receiving agency appoints a person not from the transferring agency to that position.

An implementing regulation provides:

(a) Before a reduction in force is made in connection with the transfer of any or all of the functions of a competitive area to another continuing competitive area, each competing employee in a position identified with the transferring function or functions shall be transferred to the continuing competitive area without any change in the tenure of his or her employment.

5 C.F.R. § 351.302(a) (1982).

In this case, the Board found that the block grant function was a new function and therefore had not been transferred from the Community Services Administration to the Office of Community Ser-

vices Administration to the Office of Community Services, but that the other functions of the former agency had been so transferred. That finding is supported by substantial evidence, and we have no basis to disturb it.

The Department conceded, both in the administrative proceedings and before this court, that all the Community Services Administration employees were "identified" with the functions that were transferred from that agency to the Office of Community Services. In the light of that concession, section 3503(a) required the Department to offer Community Services Administration employees positions in the Office of Community Services for which they were qualified before hiring anyone else for those positions.

The Department did not do so initially, since it took the position that because the Community Services Administration was being abolished, its employees had no reassignment rights. Following the district court's decision in the Schweiker case (supra, p. 4), however, the Department corrected its error. It filled all of the jobs in the Office of Community Services associated with the transferred functions with former employees of the Community Services Administration, made the appointments of those employees effective as of October 1, 1981, and gave the employees backpay to that date. The result of this action was retroactively to give the reemployed Community Services Administration employees all the rights

they had under section 3503(a).

The Board recognized that at the time of the termination of the Community Services Administration and the establishment of the Office of Community Services -- which the Department treated as a reduction-in-force -- the Department had not followed the governing reduction-in-force procedures. The Board, however, refused to "invalidate the entire reduction in force." It ruled:

Where, as in this case, the ultimate question for resolution relates to the retention of substantially fewer employees than were necessary prior to the transfer, the agency's non-compliance with certain provisions of part 351 does not warrant unconditional reversal of the entire reduction in force since many of those employees would have been subjected to separation from the federal service in any event.

The Board remanded the case to determine "[t]he effects of this agency error as it relates to each [petitioner]." In these proceedings, each petitioner could present "evidence that tends to establish that he was denied retention to which he was otherwise entitled," and to "identify a position or positions for which he was qualified that have been assigned to other employees with less retention standing or positions occupied by employees who had no initial entitlement to transfer."

In challenging this ruling, the petitioners contend that "an illegal separation is null and void," that each employee therefore "must be treated for pay purposes as if the separation had not occurred, subject, of course, to any valid

subsequent separation action," and that each is now entitled to reinstatement with backpay. Alternatively, they contend that reversal is required "because the government failed to create and maintain the records needed to calculate the hypothetical reduction in force."

In arguing that all of them are entitled to reinstatement with backpay, the petitioners rely primarily upon Vitarelli v. Seaton, 359 U.S. 535 (1959). There the government had dismissed Vitarelli as a security risk. The Court set aside the dismissal as "illegal and of no effect," id. at 544, because the proceedings by which it had been effected violated the governing regulations. It concluded: "It follows from what we have said that peti-

tioner is entitled to the reinstatement which he seeks, subject, of course to any lawful exercise of the Secretary's authority hereafter to dismiss him from employment in the Department of the Interior." Id. at 546.

The present case is far removed from Vitarelli. There only a single employee was involved, the Court held that he had been improperly discharged from his position, and it ordered him reinstated to the position he had occupied. The present case, in contrast, involved a reduction-in-force in which more than 900 employees sought reinstatement with a new agency that had only 165 positions to fill. There was no way in which the Office of Community Services could have hired all

the former employees of the Community Services Administration. Only a relatively small percentage of the Community Services Administration employees were entitled to employment at the Office of Community Services. All or most of the employees so entitled, in fact, may have been hired. We decline to extend the principle applied in Vitarelli (and in the other similar cases upon which the petitioners rely) to the wholly different factual situation here.

In selecting the 165 employees to fill the positions at the Office of Community Services, the Department relied upon master lists establishing priority retention rankings for all the former Community Services Administration employees. Supra, p. 6. Those lists did not

satisfy the requirements of traditional reduction-in-force registers, since they did not show the competitive levels of each employee, 5 C.F.R. § 351.403 (1984), and there were no separate retention registers for each competitive level, 5 C.F.R. § 351.404 (1984).

Accordingly, there may have been some former Community Services Administration employees who were not given jobs with the Office of Community Services to which they would have been entitled if the Community Services Administration had conducted a proper reduction-in-force.

The remand procedure that the Board adopted in this case was designed to enable individual employees who are in that situation to obtain the jobs they should

have obtained. As noted, under the procedure, individual former Community Services Administration employees will be given the opportunity to show that there was a position in the new agency "assigned to [an]other [former Community Services Administration] employee[] with less retention standing or . . . occupied by [an] employee[] who had no initial entitlement to transfer." If an employee makes such a showing, the burden then will shift to the Department to refute that showing. If the Department cannot do so, the employee will be entitled to that position. Since it is conceded by all parties before us that all Community Services Administration employees were identified with functions that were transferred, the only is-

sue on the remand will be the relative retention priorities of the employee claiming the particular position and the employee appointed to it.

In directing this procedure, the Board rejected the Department's contention that the retention rights of individual employees who had not been appointed to positions with the Office of Community Services could not be determined. It stated:

We specifically reject the agency's contention that it is impossible to determine identification of the employee because of inaccurate position descriptions. There is ample evidence available in the file concerning the organization and functional activities of CSA. In addition, we note that many of the positions within CSA were identical and located in the same organization.

Although the petitioners challenge

factual basis for these findings, we conclude that they are supported by substantial evidence. Ms. Olivari, a department classification specialist, was the only witness who had reviewed the Community Services Administration records. She found that they were sufficient to make a "functional comparison" of the position descriptions to determine what functions of the Community Services Administration had been transferred to the Office of Community Services. Ms. Olivari also testified that the necessary information could be obtained through a procedure known as a "desk audit," and that one could "conduct a regular desk audit after an agency has been abolished."

The petitioners contend, however, that because the government was at fault

in not having proper reduction-in-force registers for the Community Services Administration employees, the Board was precluded from adopting the remedy it selected, on the ground that the government should not be permitted to profit from its own wrongdoing. There is no issue here about the government's "profiting" from the failure to maintain proper records. As we have held, only a relatively small number of Community Services Administration employees were entitled to employment at the Office of Community Services (165 out of 900).

We conclude that the Board has devised an appropriate procedure to determine whether any or the employees of the former agency who were not employed at

at the latter agency should have been so employed because of their retention priorities. We also have upheld, supra, p. 16, as supported by substantial evidence, the Board's finding that the retention priorities of Community Services Administration employees who were not transferred can now be determined. These conclusions answer and require rejection of the petitioners' argument based on the government's fault in not providing reduction-in-force registers for the Community Services Agency employees.

In evaluating the Department's and the Board's treatment of this case, it is essential to recognize that this was not a typical reduction-in-force situation. Normally, reductions-in-force result from

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a decrease in the agency's available funds, a change in the agency's workload, or a transfer to another agency of a portion of an agency's work. The present case, however, resulted from the elimination of an entire agency in connection with a significant change in the program that agency had administered, and the creation of a new agency to handle under a different program of some the work the old agency did.

The Board's handling of this case constituted a reasonable method of dealing with perhaps a unique and certainly most unusual situation. In our opinion, it was one that fairly and appropriately adjusted and accommodated the competing and substantially conflicting interests of the employees and the government.

IV

The petitioners also challenge the Board's refusal to treat their appeal as a class action on behalf of all former Community Services Administration employees who were not employed at the Office of Community Services.

The standard for determining whether an appeal to the Board will be heard as a class action is set forth in 5 C.F.R. § 1201.27(a) (1984):

The presiding official shall hear the case as a class action if he/she finds a class action will be the most efficient and fair way to adjudicate the appeal and will adequately protect the interests of all parties.

The decision whether to grant class action status is largely committed to the Board's discretion. Cf. Adashunas v. Negley, 626 F.2d 600 (7th Cir. 1980) ("The standard of

review of the denial of class certification [by a district court] is whether the court abused its discretion.") We cannot say the Board abused its discretion here in denying class action status.

In refusing class action status, the Board concluded that the limited consolidation it ordered -- "only for the purposes of consideration of the common issues of law and fact which are national in scope" -- would be "the most expeditious, equitable, and administratively efficient procedure." It stated:

We believe that such consolidation will meet the concerns of all parties, and will result in a more manageable proceeding than would a combined class action and consolidated proceeding. Moreover, this procedure will assure the preservation of individual rights with

respect to those issues which are not common, and complete individual appellate records in the event of judicial review.

The petitioners have not given any convincing reason why the Board's ruling was unwarranted. Indeed, in view of our decision on the merits of the case, it is difficult to see how the petitioners have been prejudiced by the Board's failure to convert their individual appeals into a class action. Even if the Board had provided for class action treatment in deciding the common issues, it still would have been necessary under the Board's decision to remand the case for separate hearings with respect to the individual petitioners.

The Board noted that "[t]he main

concern expressed by those requesting a class action is that many former employees have not filed appeals to the Board, in reliance on either the class action petition or" the district court's order in Schweiker. It "recognize[d] that former CSA employees could justifiably have delayed the filing of their appeals in reliance on [the district court's] Order, which stated that any former CSA employee who was dissatis[fied] with the HHS determination regarding functions transferred from CSA would have a right of appeal to the Board." It stated:

In light of the foregoing circumstances, it is reasonable to assume that many former CSA employees are awaiting notification from HHS, and are unaware of the fact that the filing period for their appeals has expired. Therefore, HHS is hereby ORDERED to notify all former CSA

employees of their precise status within 15 days of the receipt of the Order, and to advise all such employees that they may appeal the HHS determination to the appropriate regional offices of the Board no later than 20 days after their receipt of the HHS notification.

The petitioners contend that the notice the Department sent in response to this directive was inadequate because it did not inform the employees that they had been dismissed under the procedures the Department followed in response to the order of the district court. At the present stage of this case, however, any question concerning the adequacy of the notice to inform the former Community Services Administration employees of their right to appeal to the Board is premature. That is an abstract question, since we cannot tell

whether in fact any employees refrained from taking an appeal in response to a notice that on its face seems adequate to inform the employees of their rights.

V

The petitioners urge us to issue a writ of mandamus to require the Board to order their reinstatement with backpay to positions at the Office of Community Services. The reasons that have led us to affirm the Board also require denial of the petition for mandamus, which is not a substitute for appeal Roche v. Evaporated Milk Association, 319 U.S. 21, 26 (1943).

CONCLUSION

The decision and order of the Merit Systems Protection Board is affirmed. The petition for a writ of mandamus is denied.

AFFIRMED AND MANDAMUS DENIED.

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

CASSANDRA M. MENOKEN)	
)	
Petitioner,)	
	)	Appeal No. 85-861
v.)	
)	
DEPARTMENT OF HEALTH)	
AND HUMAN SERVICE,)	
)	
Respondent.)	

DECIDED: February 18, 1986

Before FRIEDMAN, BALDWIN, and NEWMAN, Circuit Judges. FRIEDMAN, Circuit Judge.

This case is a sequel to our decision in Certain Former CSA Employees v. Department of Health & Human Services, 762 F.2d 978 (1985) (Former CSA Employees). There we affirmed the decision of the Merit Systems Protection Board (Board) that (1) upheld a reduction in force resulting from the abolition of the Community Services Administration and the transfer of

some of that agency's functions and employees to a new agency, the Office of Community Services (new agency), and (2) remanded the case to give former employees of the Community Services Administration the opportunity to show that they had greater rights to positions in the new agency than the employees who had been transferred to those positions. In the present case, the Board held in a remanded proceeding that the retention rights of the petitioner, a former Community Services Administration employee who had not been transferred to the new agency, had not been violated in the reduction in force. We affirm.

I

A. The background facts are set forth in detail in Former CSA Employees and need not be repeated here. In summary,

they are as follows:

The Community Services Administration, which administered the grants under the federal antipoverty programs made to state community action agencies, was abolished on September 30, 1981. A new agency, the Office of Community Services, was established in the Department of Health and Human Services (Department). Certain of the functions the Community Services administration had performed were transferred to the new agency. In Former CSA Employees, we upheld the Board's findings that, with one exception not here relevant, all the functions of the Community Services Administration had been transferred to the new agency, and we recognized that the Department had conceded that "all the Community Services Administration employees were 'identified'

with" the transferred functions. 762 F.2d at 983.

When it was abolished, the Community Services Administration had more than 900 employees. The new agency, which had only 165 employees to perform the transferred functions, filled those positions with former Community Services Administration employees. Because the Community Services Administration had not maintained adequate personnel records, the Department

could not reconstruct exact reduction-in-force priority registers for the Community Services Administration employees or determine the exact priorities among those employees for the new positions in the Office of Community Services. It therefore established master-retention lists that ranked each permanent Community Services Administration employee according to veterans preference rights and dates of service ...

The Department then offered permanent appointments

for each position in the Office of Community Services that was associated with a transferred function. The offers were made to those employees who had the highest retention standing on the master list.

Id. at 981.

On the appeal of former Community Services Administration employees who had not been selected for positions in the new agency under this procedure, the Board held that

the Department had not followed the governing reduction-in-force procedures. The Board, however, refused to "invalidate the entire reduction in force." It ruled:

Where, as in this case, the ultimate question for resolution relates to the retention of substantially fewer employees than were necessary prior to the transfer, the agency's non-compliance with certain provisions of part 351 does not warrant unconditional reversal of the entire reduction in force since many of those employees would have been subjected to separa-

tion from the federal service in any event.

The Board remanded the case to determine "[t]he effects of this agency error as it relates to each [petitioner]." In these proceedings, each petitioner could present "evidence that tends to establish that he was denied retention to which he was otherwise entitled," and to "identify a position or positions for which he was qualified that have been assigned to other employees with less retention standing or positions occupied by employees who had no initial entitlement to transfer."

Id. at 983-84.

In affirming the Board's decision, we "conclude[d] that the Board has devised an appropriate procedure to determine whether any of the employees of the former agency who were not employed at the latter agency should have been so employed because of their retention priorities."

Id. at 985.

B. When the Community Services Administration was abolished, the peti-

tioner was a GS-14 attorney advisor at that agency. She was not offered a position at the new agency and therefore was removed on September 30, 1981, pursuant to the reduction in force.

The petitioner was a party to the Board proceedings to review the reduction in force. Pursuant to the remand ordered in that case and after a hearing, the presiding official of the Board on August 30, 1984 (prior to our decision in Former CSA Employees), upheld the removal of the petitioner.

The presiding official held that the petitioner's function was transferred only to the new agency and that the petitioner therefore was "entitled only to compete for positions" in the new agency. The presiding official ruled that the peti-

tioner was not entitled to any of the four attorney positions in the new agency.

Three of those positions were at grade GS-15. The presiding official held that the petitioner, who had been a GS-14 in the Community Services Administration, was not entitled to any of those three positions because "[a]n employee is not entitled to assignment at a higher grade through transfer of functions or reduction in force." The presiding official ruled that the petitioner was not entitled to the GS-14 position since that position was filled by an employee who was in a higher tenure group on the master list than the petitioner.

The petitioner sought review of the Board's decision in this court. We stayed her case pending the decision in Former CSA Employees.

II

As we explained in Former CSA Employees, in the proceeding on remand each employee

could present "evidence that tends to establish that he was denied retention to which he was otherwise entitled," and to "identify a position or positions for which he was qualified that have been assigned to other employees with less retention standing or positions occupied by employees who had no initial entitlement to transfer."

Id. at 983-84. In upholding the remand procedure, we recognize, as had the Board, that although the reduction in force had not been conducted in accordance with proper procedures, it would have been inappropriate to set aside the entire reduction in force because "[o]nly a relatively small percentage" of the more than 900 employees of the Community Services Administration "were entitled to employment"

at the new agency, which had only 165 employees. Id. at 984. We further pointed out that "[a]ll or most of the employees so entitled, in fact, may have been hired." Id. We explained that on the remand the burden rests on the employee initially

to show that there was a position in the new agency "assigned to [an]other [former Community Services Administration] employee[] with less retention standing or ... occupied by [an] employee [] who had no initial entitlement to transfer." If an employee makes such a showing, the burden then will shift to the Department to refute that showing. If the Department cannot do so, the employee will be entitled to that position. Since it is conceded by all parties before us that all Community Services Administration employees were identified with functions that were transferred, the only issue on the remand will be the relative retention priorities of the employee claiming the particular position and the employee appointed to it.

Id.

The question before us thus is whether the petitioner established that there was any position in the new agency to which she had a greater entitlement than the person appointed to that position. We conclude, as did the Board, that petitioner did not make that showing and that accordingly the Board properly upheld the application of the reduction in force to the petitioner.

A. There were four attorney positions in the new agency. The petitioner asserts that she was "qualified" for all of them. Three of the positions were at grade GS-15, but the the petitioner had been only a grade GS-14 at the Community Services Administration.

The Board correctly held that she was not entitled to any of these GS-15 positions. The petitioner's contrary argument relies upon the word "qualified" in the prior decisions of the Board and this court, which she construes to mean that she is entitled to any position in the new agency for which she had the necessary qualifications.

Read in context, however, the word meant only that in addition to showing that a particular position in the new agency was within the applicable competitive area, the employee also had to show that he had the qualifications to fill the position. Neither the Board nor the court intended to expand the scope of the employee's right to cover every position in the

new agency for which the employee might be qualified, without regard to the position he or she held in the Community Services Administration. Indeed, it would be anomalous if, as a result of a reduction in force, an employee who initially was removed could use flaws in the reduction in force to obtain a higher grade than the one he had held. As the presiding official correctly stated, "[a]n employee is not entitled to assignment at a higher grade through transfer of function or reduction in force. See 351.302(c) and 5 C.F.R. § 351.703." See Mello v. Department of Energy, 20 M.S.P.R. 45 (1984).

For similar reasons the Board correctly refused to permit the petitioner to show that her position in the Community

Services Administration should have been classified at grade GS-15 or that she was qualified for a position at that level. In determining the retention rights of the former employees of the Community Services Administration, the Board necessarily had to look to the situation as it actually existed in that agency when the reduction in force took place on September 30, 1981, and not to the situation that might or should have existed on that date. It would be almost impossible to determine the retention rights of employees affected by a reduction in force or transfer of function if the correctness of the classification of the positions the employees held had to be reexamined. Reductions in force deal with actual and not theoretical or possible situations.

The presiding official further held that the petitioner could not displace the incumbent of the only GS-14 position at the new agency, Alfred J. Harris, because she was in a lower retention group on the master list, group IB, than Harris, who was in group IAD. Although the petitioner contends that she had "superior rights" to three named individuals in the Department (see below), she does not contend that retention rights were superior to those of Harris, who was at the top of the master retention list. Moreover, his service computation date was July 20, 1972, and her date was January 6, 1976.

The petitioner argues that she had superior rights to three named persons at the new agency. Two of those individuals, however, were investigators from the Department of Justice who had been detailed

to the new agency. The third person, John Mayers, held a GS-15 position to which, as we have shown, the petitioner was not entitled.

B. The petitioner argues that she was entitled to displace other attorneys elsewhere in the Department besides those holding the four positions in the new agency described in part A above. The argument rests on the assertion that those other attorneys performed work for the new agency and that that fact somehow qualified the petitioner for their positions.

The functions that were transferred upon the abolition of the Community Services Administration were transferred solely to the new agency and not elsewhere within the Department. The only right

the Community Services Administration employees had was to be transferred to "a position in the new agency" that had been given to a former Community Services Administration employee with lower retention rights than the protesting employee. 762 F.2d at 984. No attorney positions were transferred from the Community Services Administration to components of the Department other than the new agency.

Attorney positions elsewhere in the Department did not become positions transferred from the Community Services Administration merely because the attorneys in those positions performed some legal work for the new agency. Indeed, there is no indication that any of those other attorney positions in the Department were filled by transferring former Community

Services Administration attorneys.

This argument of the petitioner rests upon the same erroneous concept of "qualification" that underlies her contention that she was entitled to one of the GS-15 positions in the new agency. For the reasons given in part IA, supra, this argument also fails.

C. Underlying much of the petitioner's argument is the contention that the Board was barred from any reliance upon the master retention lists in determining whether a particular former Community Services Administration employee was entitled to displace another such employee who had been transferred to the new agency. That issue, however, was litigated and decided adversely to the former Community Services Administration employes in the Former CSA

Employees case, to which the petitioner was a party.

Although neither the Board nor this court explicitly addressed the use of the master list, approval of that use was implicit in the decisions. Our decision noted that the master lists "establishing priority retention rankings for all the former Community Services Administration employee . . . did not satisfy the requirements of traditional reduction-in-force registers" 762 F.2d at 984. We nevertheless upheld the Board's handling of the case under the remand procedure it devised "to determine whether any of the employees of the former agency who were not employed at the latter agency should have been so employed because of their retention priorities" as "a reasonable me-

thod of dealing with perhaps a unique and certainly most unusual situation." Id. at 985.

In so holding, we did not intend to require the Board to attempt to reconstruct "traditional reduction-in-force registers." Instead, we intended to, and did, give the Board considerable discretion in determining the bases upon which it would ascertain whether particular former Community Services Administration employees had a higher right to a position in the new agency than the employee the new agency had appointed. We cannot say the Board abused its discretion in the method it used in deciding that question in this case adversely to the petitioner.

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The order of the Board upholding the application of the reduction in force to the petitioner is affirmed.

AFFIRMED

85-861

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NANCY A. PETTIS, Petitioner,

v.

DEPARTMENT OF HEALTH & HUMAN SERVICES

Respondent.

Appeal No. 86-883.

United States Court of Appeals,
Federal Circuit.

October 22, 1986.

Before MARKEY, Chief Judge, FRIEDMAN,
Circuit Judge, and BENNETT, Senior Circuit
Judge.

BENNETT, Senior Circuit Judge.

Petitioner Nancy A. Pettis (Pettis)
appeals the final decision of the Merit
Systems Protection Board (MSPB or board),
sustaining the reduction-in-force action
taken with respect to petitioner's
separation for which she seeks reinstatement
and back pay. We affirm.

BACKGROUND

Effective October 1, 1981, Congress abolished the Community Services Administration (CSA) and transferred some of its former functions to a new agency, the Office of Community Services (OCS), within the Department of Health and Human Services (Department or HHS). At the time of the reduction in force (RIF), Pettis was employed at the CSA as a social science analyst at the GS-14 level. Since the CSA employed over 900 employees and the OCS had positions for only 165, and because CSA personnel records were inadequate, the HHS created preference order master lists (POML) under which, according to seniority, veteran's preference and skills, the former CSA employees with the highest POML retention standing were offered vacant permanent

positions in the OCS for which they were qualified and eligible. Pettis received POML position No. 166 but did not receive a position during the RIF and was separated from federal service on September 30, 1981. Pettis appealed her separation, and after a hearing on the merits, the presiding official of the board sustained the separation by an initial decision on September 17, 1984. Once the official's decision became the board's final decision on October 22, 1984, Pettis made a timely appeal to this court.

Her appeal to this court was stayed during an appeal by 297 former CSA employees with common issues of law regarding the CSA reduction in force. In that case, *Certain Former CSA Employees v.*

Department of Health and Human Services, 762 F.2d 978 (Fed. Cir. 1985) (Former CSA Employees), this court affirmed the board's procedure for handling the reduction in force. Following that decision, which was adverse to petitioners, Ms. Pettis resumed her petition for individual review, claiming entitlement to some 50 temporary and permanent positions and citing the veteran's preference provision and replacement provisions of 5 U.S.C. §§ 3502, 3503(a) (1982).

In its review, the board found that, since the block grant functions were a new and distinct function within the OCS, petitioner had no entitlement to block grant positions. Also, since no one is entitled to promotion as the result of a reduction in force or even a transfer of

functions, the board found that petitioner had no right to GS-15 or higher positions. See *Menoken v. Department of Health and Human Services*, 784 F.2d 365, 367 (Fed. Cir. 1986). The board found that Ms. Pettis did not have superior entitlement rights (based on the POML) to the persons who received the available GS-14 positions. Finally, since Ms. Pettis turned down a telephone offer for a GS-13 program analyst position within the discretionary grants division during the summer of 1982, the board concluded that the petitioner was not entitled to another position at GS-13 or lower. Therefore, the board affirmed her separation from federal service.

OPINION

In this appeal from the board's decision, Pettis claims that she had greater retention and assignment rights than persons who were given positions at GS-13 or below in the OCS, that the board's reliance on her refusal of the GS-13 position 9 months after her separation was erroneous, that she was denied the right to compete for Group III positions in her commuting area outside her competitive area, that she should have been transferred to HHS under 5 U.S.C. § 3503(b), and that her service computation date is incorrect. She seeks reinstatement and back pay under 5 U.S.C. § 5596 (1982).

Petitioner does not challenge the board's findings that she was not entitled

to GS-14 or higher positions as a result of the reduction in force. However, she does argue that her refusal of a GS-13 position in the summer of 1982 should have no bearing on whether she was entitled to such a transition position in October 1981, based on the POML during the reduction in force.

In support of its conclusion that Pettis was barred from consideration for GS-13 or lower positions as a result of her refusal of the offer, the board cited Federal Personnel Manual (FPM), chapter 351, subchapter 4-2(a) (July 7, 1981). That section provides, in pertinent part:

If a Group I or II employee refuses an offer which is in accord with his or her rights the agency may separate or fur-

lough him or her by reduction in force."1/

In addition, as noted in the respondent's brief, FPM chapter 351.4-5(a)(4) goes on to provide, in relevant part:

a. General.

....
(4) When there are two or more positions with the highest available representative rate and one or more positions with lower representative rates, the agency offers one of the positions with the highest available rate.

b. Limits on assignment right. An employee has no right to assignment to a position with a grade or representative rate higher than his or her own. An employee is entitled to only one proper offer. He or she is entitled to no further offer when he or she:

1/ It is uncontested that Pettis was a Group I employee, i.e., a §career employee not serving a probationary period." 5 C.F.R. § 351.501(b)(1) (1986).

- accepts an offer,
- rejects an offer, or
- fails to reply to an offer within a reasonable time.

See also *Etter v. Department of Defense*, 14 M.S.P.R. 367, 369 (1983) (in a reduction in force, an employee is entitled to one proper offer even if another position was available for which employee qualified); *Gayheart v. Department of the Army*, 12 M.S.P.R. 300 (1982) (fact that others got second offers in reduction-in-force action is insignificant since receipt of one offer satisfies assignment rights in a reduction-in-force action). Although the prior decisions of the Merit Systems Protection Board are not binding precedent for this court, the reasoning contained therein can be looked to, in proper situations, for helpful guidance.

If the reduction in force at issue had been an ordinary reduction in force and Pettis had received the reassignment offer for a GS-13 position in the OCS, the requirements cited above make it clear that her refusal of the position would end her entitlement to further offers, provided that a GS-13 position was the highest available to which she was entitled. But as this court recognized in *Former CSA Employees*, "it is essential to recognize that this was not a typical reduction-in-force situation." 762 F.2d at 985.

In *Former CSA Employees*, this court was faced with a challenge by 297 former CSA employees to the reduction-in-force procedures utilized by the Department. Because the Department had been unable to

reconstruct exact reduction-in-force priority registers for the CSA employees,

[i]t therefore established master retention lists that ranked each permanent [CSA] employee according to veterans preference rights and dates of service

The Department then offered permanent appointments for each position in the [OCS] that was associated with a transferred function. The offers were made to those employees who had the highest retention standing on the master list. Employees who accepted the offers were treated as restored to duty as of October 1, 1981, and were given backpay from that date. Employees who rejected the offer or who did not receive any offer because of their lower position on the master retention list were placed upon the Department's reemployment priority list.

762 F.2d at 981. Thus, despite finding that the Department had not followed the governing reduction-in-force procedures, the board had declined to invalidate the entire reduction-in-force procedure actually utilized.

We affirmed the board's reduction-in-force procedures, concluding that "the Board [had] devised an appropriate procedure to determine whether any of the employees of the former agency who were not employed at the latter agency should have been so employed because of their retention priorities." *Id.* at 985. The court recognized that the challenged reduction in force was the result of the unusual elimination of an entire agency in connection with a significant change in the program that agency had administered combined with the creation of a new agency

to handle under a different program some of the old work that the prior agency did.

[1] Thus, while not a traditional reduction in force with traditional reduction-in-force registers in which all assignments were made prior to the affected employee's separation from government service, the procedure employed during the abolishment of CSA was a reduction in force nonetheless. The job offered to Pettis in the summer of 1982 was in the Division of Discretionary Grants in the OCS, a transferred function, and must be considered as having been made under her assignment rights, not her reemployment rights. If she had accepted the position, she would have been entitled to back pay from October 1, 1981. Thus, having concluded that the reduction in

force was still ongoing at the time of the summer 1982 offer, traditional rules governing assignment rights support the Department's argument that her refusal of the offer barred further consideration for GS-13 or lower positions allocated during the reduction in force.

[2,3] An agency has wide discretion in conducting a reduction in force. *Gandola v. Federal Trade Commission*, 773 F.2d 308, 313 (Fed. Cir. 1985). Ordinarily, this court will not disturb a reduction in force absent a clear abuse of discretion or a substantial departure from applicable procedures. *Id.* Even in a case such as this, where the reduction in force is nontraditional and conducted under unique procedures, our review remains limited by statute. The board's

decision must be affirmed unless it is found to be:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule or regulation having been followed; or

(3) unsupported by substantial evidence.

5 U.S.C. § 7703(c) (1982). See also *Hayes v. Department of the Navy*, 727 F.2d 1535 (Fed. Cir. 1984).

As noted, this court has already approved the reduction-in-force procedures utilized in the present case. Petitioner has not alleged that she was misinformed about her rights under these procedures and cannot thus claim prejudice on this account. Cf. *Covington v. Department of Health & Human Services*, 750 F.2d 937

(Fed. Cir. 1983) (CSA employee suffered prejudice when he retired on the basis of a misleading and erroneous notice). She does contend that the procedures as applied wrongfully deprived her of employment. However, her counsel asserted at oral argument on appeal that, at the time she turned down the job offer in 1982, Pettis did not wish to work for the government. Why she has pursued an inconsistent course of seeking reinstatement and back pay and refusing the very offer which would have given it to her is not clear. If she only desired back pay, as now alleged in her brief, she could have accepted the proffered position and then resigned. She did not do this. The court cannot correct her mistake retroactively.

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It is, for the foregoing reasons, unnecessary to address the petitioner's other contentions.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CERTAIN FORMER COMMUNITY SERVICES))	
ADMINISTRATION EMPLOYEES,)	
)	
Appellants	)	DECISION
	)	NUMBER
	)	HQ12008110063
v.)	
)	
DEPARTMENT OF HEALTH AND)	
HUMAN SERVICES)	
)	
Respondent)	
)	

PARTIAL INITIAL DECISION

By: John J. McCarthy Dated: August 20, 1982
Chief Administrative
Law Judge

With appearances by:

Janice M. Xaver, Esq., designated Lead
Counsel for appellants;

Florence Asnes, Attorney for respondent.

I. BACKGROUND

The Community Services Administration
(CSA) was abolished on October 1, 1981
and all of its employees at that time were
discharged. Although the Office of Com-
munity Services (OCS) was created as an

operating division in the Department of Health and Human Services (HHS) to take over some of the CSA functions, none of the former CSA employees was transferred to OCS when CSA was abolished. On October 16, 1981, HHS was permanently enjoined from hiring employees for OCS without giving former CSA employees preference rights granted by 5 U.S.C. § 3503.

National Council of CSA Locals v.

Schweiker, (C.A.A. 181-2267, D.D.C., October 16, 1981). The court declined to decide the question of whether there had been an actual transfer of functions, ruling that plaintiffs had not exhausted their administrative remedies with respect to that issue.

Upon motion of six appellants and the respondent, they ordered that the appeals of the former CSA employees be consolidated and assigned to the Office of the Administrative Law Judge for

consideration of common issues of law and fact of national scope, and for issuance of a partial initial decision on the common issues. In view of the many individual appeals, exceeding 360 in number, and the anticipated problems of conducting discovery and of holding hearings at times and places and in a manner fair to all appellants, lead counsel was designated to represent all appellants -- an action deemed consistent with the Board's order for consolidation.1/ Therefore, pre-hearing discovery was completed and a single hearing was held in Washington, D.C. on June 16, 17, and 18,

1/Janice M. Xaver, Esq., initially retained by the National Council of CSA Locals (American Federation of Government Employees) to represent a great number of appellants, was chosen to serve as lead counsel for the purpose of the consolidated proceedings. Conflict-of-interest questions arising from Ms. Xaver's role as attorney for the union were resolved in her favor by rulings of the presiding official.

1982. Briefs were submitted by the parties on July 22, 1982, which together with the entire record have been fully considered.

II. STIPULATED FACTS

The parties stipulated to certain facts prior to hearing. Those stipulations approved and adopted as part of my findings in these cases are set forth below.

1. The Community Services Administration (CSA) operated grant programs under the statutory authority of the Economic Opportunity Act of 1964. 42 U.S.C. §§2701 et seq., with regulations promulgated at 45 C.F.R. §§1000 et seq.

2. As of mid-August 1981, CSA had approximately 550 permanent employees in its 10 regional offices and approximately 340 permanent employees working in its headquarters in Washington, D.C.

3. On July 30, 1981, Dwight Ink, Director of CSA, distributed a general RIF notice,

which informed employees that the President had requested no funding for CSA in fiscal year 1982. The notice stated that the agency might terminate and that the addressee's job might end as of September 30, 1981. Attached was general information on reductions in force (RIFs).

4. On August 13, 1981, the Omnibus Budget Reconciliation Act of 1981, Pub. Law 97-35, was signed into law by President Reagan. Pursuant to Title VI of this statute, the Community Services Administration was terminated as an independent federal agency as of October 1, 1981.

5. By memorandum dated August 13, 1981, David A. Stockman, Director of the Office of Management and Budget, informed Dwight A. Ink, Director of CSA, that § 682(e) of the Budget Act, Pub. L. No. 97-35, authorized him to provide for the termination of the affairs of CSA and directed him to provide for the transfer or other

disposition of personnel, assets, records, funds, etc. Pursuant to that authority, Mr. Stockman wrote that the principal purpose of that Act was to terminate the specific programs of CSA itself; that although there would be no transfer of CSA functions or resources to HHS, Mr. Ink should ensure that CSA records are not withheld from HHS to the extent, if any, that they are desired by HHS; and that Mr. Ink should dispose of all the resources of CSA. To this end, Mr. Stockman directed Mr. Ink to dispose of property and assets in accordance with General Services Administration regulations, to separate personnel in accordance with Office of Personnel Management regulations, to dispose of unexpended appropriations in accordance with Department of Treasury regulations, and to make arrangements with one or more executive agencies to handle any final administration

of liabilities, grants or contracts, not later than September 30, 1981.

6. On August 21, 1981, CSA employees received specific RIF notices, which stated that CSA programs would be funded by block grants, and that CSA had received no funding for fiscal year 1982. Employees were informed that their positions were abolished, that no positions were available for reassignment, and that they would be separated as of September 30, 1981. The notice also stated that retention registers had been prepared and were available for inspection and that addressees who thought that their rights had been violated could appeal to the Merit Systems Protection Board. Attached were pertinent MSPB addresses and regulations.

7. On September 5, 1981, pursuant to his authority under ¶ 682(e) of the Budget Act, David Stockman directed Secretary Schweiker to service remaining CSA grantees

until their grants were expended. He stated that OMB recognized the need for 90 staff years in the HHS personnel ceiling and the need for \$4.6 million in funding to accomplish this task.

8. On September 15, 1981, Secretary Schweiker sent a memorandum to David A. Stockman, stating that, including the Inspector General workload, HHS would need a total of 165 staff years and \$6.6 million in funding in fiscal year 1982 to perform CSA closeout activities.

9. By a letter to Honorable Harrison Schmitt, Chairman, Subcommittee on Labor, Health and Human Services, Education and Related Agencies, Committee on Appropriations, U. S. Senate, dated September 22, 1981, David A. Stockman requested \$6.6 million in fiscal year 1982 for HHS to use for the costs of administering those CSA grants that would be spending out funds beyond FY 1981. Mr. Stockman

forwarded a copy of this letter as an enclosure to a letter addressed to Secretary Schweiker dated October 14, 1981.

10. On September 12, 1981, a complaint was filed in the U.S. District Court for the District of Columbia entitled National Council of CSA Locals, American Federation of Government Employees (AFGE), AFL-CIO v. Richard S. Schweiker, alleging that CSA employees had rights under 5 U.S. C. § 3503 to transfer to HHS to perform certain activities authorized by the Budget Act, Pub. L. No. 97-35, sections 611 through 633 and 671 through 683. In conjunction with this suit, a motion was made that a preliminary injunction be issued which would prevent the Department of Health and Human Services from filling certain positions associated with HHS duties under the Budget Act without first effecting the transfer of CSA employees in accordance with the Veterans Preference Act.

11. On September 28, 1981, Dwight A. Ink distributed at the worksite a memorandum to CSA employees on the subject of severance pay and retirement. The memorandum explained that employees could voluntarily retire or resign prior to the effective date of the CSA RIF in order to protect the severance pay they could lose if the Court found that a transfer of function from CSA to HHS had occurred and HHS offered them a job at the same grade in their commuting areas which they refused. The memorandum further explained that resignations could be withdrawn up until the effective date of the resignation. The parties cannot verify that all CSA employees at the worksite received a copy on the date of distribution.

12. On September 30, 1981, all employees of the Community Services Administration were separated as a result of a RIF.

13. The document included at Tab 22 of attachments to Stipulation of Facts is an accurate reflection of the staffing and organizational structure which was in effect at CSA prior to its abolition, to the best knowledge of the parties.

14. The material included at Tab 23 is a statement of the organization, mission and functions of CSA dated December 1978.

15. The materials attached at Tabs 24 and 24A are accurate listings of the personnel employed by CSA on August 22, 1981 and September 24, 1981, to the best knowledge of the parties.

16. On September 30, 1981, the Office of Community Services (OCS) was established as an operating division in the Department of Health and Human Services. The statement of organization, functions, and delegations of authority was published in the Federal Register on October 6, 1981.

17. The positions within OCS were created

on the dates indicated on the chart at Tab 4B. The creation dates given are the dates the positions were filled for the first time. Asterisks indicate that appointments were retroactive to October 1, 1981. "T" indicates that the position was temporary.

18. In accordance with the Department's Personnel Instruction 351-1 (Tab 27A), HHS Assistant Secretary for Personnel Administration, Thomas S. McFee, on October 1, 1981 established the following competitive areas:

- (1) OCS employees within the Washington metropolitan area.
- (2) Separate competitive areas for each region, to include all OCS employees within a commuting area.

On February 11, 1982, Mr. McFee issued HHS Circular 35106, which established one nationwide competitive area

for all positions in the Office of the Inspector General, Office of Community Services. Mr. McFee issued the Circular in order to implement a decision of the General Counsel of the Office of Personnel Management which, in response to a question raised by the Department of Labor, stated that Inspectors General Offices must have competitive areas which are separate from the competitive areas for other parts of a Department.

On October 1, 1981, Mr. McFee delegated personnel authorities to the Director of the Office of Community Services. These included but were not limited to Appointing Authority, Classification Authority, Selecting Authority, Authority to Grant Leave, Excuse Absence, Approve Overtime, and Approve Restoration of Annual Leave, Authority to Detail Personnel within the Department, Authority to Propose and Decide Adverse Actions,

Authority to Decide Employee Grievances, and Authority to Approve and Authorize Training.

On October 1, 1981, Robert Trachtenberg, Director, Office of Community Services, delegated to the Director, Division of the Office of the Secretary Personnel, for headquarters and regional positions and employees of OCS the Appointing Authority, Classification Authority, and Authority to Authorize Participation in an Interagency or Nongovernment Training Program delegated to him by memorandum from the Assistant Secretary for Personnel Administration dated October 1, 1981. The delegation was effective immediately.

19. The other competitive areas currently established for HHS are explained in HHS Personnel Instruction 351-1-40.

20. On October 9, 1981, an order was issued modifying the temporary restraining

order which had been issued in the case National Council of CSA Locals, AFGE v. Schweiker, so as to permit HHS to hire former CSA employees on a temporary basis to perform the closeout, transition and Inspector General functions until the District Court's final adjudication of the lawsuit.

21. On October 13, 1981, a preliminary injunction was issued against the defendant in the case National Council of CSA Locals, AFGE v. Schweiker for the reasons set forth in the order granting the temporary restraining order.

22. On October 16, 1981, a permanent injunction was issued against the defendant in the case National Council of CSA Locals, AFGE v. Schweiker.

23. In a memorandum dated November 5, 1981, Secretary Schweiker determined that a transfer of function had occurred with respect to the closeout, Inspector General

discretionary programs, and loan fund activities of OCS. He further determined that block grant and transition activities were new programs of OCS, and, therefore, with respect to those activities no transfer occurred. He directed Mr. McFee to work with the Director of OCS to fill the appropriate positions with transferred CSA employees as expeditiously as possible.

24. OCS filled the positions through which the transferred functions would be carried out in the following manner:

a. The Agency determined that all former CSA employees were identified with functions that had transferred to OCS and that all such employees who were separated by RIF on September 30, 1981, or who involuntarily retired on September 29 or 30, 1981, met the criteria for transfer of function and would be considered for

positions in OCS.2/

b. The Agency identified those positions in OCS through which the Agency would carry out the transferred functions. These positions are listed by title, series, grade, and office in Tab 49.3/

c. The Agency identified the positions in headquarters through which the Agency would carry out the functions transferred from CSA regional competitive areas to OCS regional competitive areas and then transferred from the OCS regions to OCS headquarters. These positions are

2/The Appellants did not stipulate that the Agency's decision as to which employees "met the criteria for transfer" was correct or that no errors were made in implementing this process.

3/Appellants qualified their assent to this stipulation with the following reservation: "The Appellants do not stipulate that the Agency's decisions were correct or that no errors were made in implementing this process." The same reservation was made with respect to each of the statements made in Stipulation 24c through j.

listed by title, series and grade in Tab 50.

d. The Agency identified CSA regional employees associated with the functions transferring from CSA regional offices to OCS regional offices to OCS headquarters. These employees are listed in Tab 51.

e. The agency developed twelve lists of competing employees by gaining competitive areas in retention order. Those lists are found in Tab 52. The employees listed were those former permanent CSA employees who were separated by RIF on September 30, 1981, or who involuntarily retired on September 29 or 30, 1981.

f. For each position identified in steps c. and d., the Agency extended a job offer to the highest ranking employee on the appropriate retention register who was qualified for the position. The

highest-graded positions were filled first by individuals with the highest retention standing who were qualified for the position.

g. When an individual accepted a position, the Agency processed a personnel action canceling the separation from CSA and transferring the person to a permanent position in OCS effective October 1, 1981. The individual received back pay, adjusted for several factors including severance pay or other income received since September 30, 1981.

h. If the person declined an offer of a lower graded position or a position in a different commuting area, the person retained entitlement to severance pay and his or her name was entered on the HHS Re-employment Priority List as soon as possible.

i. The names of former CSA employees in the competitive service who did not

receive offers of employment in their commuting areas at or above the representative rates of their last positions were placed on the HHS Reemployment Priority List as soon as possible.

j. As of January 1982, HHS prepared its first computerized reemployment priority list. The January printout included the names of former CSA employees. Generally, the names of former CSA employees were added as soon as feasible. At the present time, the parties do not have sufficient knowledge to state with accuracy the date on which each name was entered.

25. On November 4, 1981, OCS sent letters to former CSA employees who had been separated by RIF on September 30, 1981 or who had retired on September 29 or 30, 1981, which described the process by which they would be considered for positions in OCS.

26. On November 16, 1981, Donna D. Beecher, Director, Office of Personnel Policy and Communicastions, HHS, sent a letter to Allen Griffith, General Services Administration, requesting a computer tape with information on former CSA personnel in order to enter their names on the HHS Reemployment Priority List. Acquiring this tape enabled HHS to expedite the placement of the names of former CSA employees on the Reemployment Priority List by entering them without rekeying the coded information.

27. On November 17, 1981, Thomas McFee met with attorneys representing former CSA employees regarding the filling of positions in OCS. At this meeting, the attorneys were given a copy of an organization and staffing chart for OCS and a description of the process by which HHS intended to fill those positions in OCS through which HHS would

carry out the functions transferred from CSA.

28. On March 5, 1982, the Agency sent letters to former CSA employees who had been separated by RIF on September 30, 1981, or who had retired on September 29 or 30, 1981, notifying them that if they had not previously exercised their right of appeal they could still appeal to the Merit Systems Protection Board within 20 days of receipt of the letter. The parties do not have sufficient knowledge to stipulate that every such employee received the letter or when the letters were received.

29. The material included at Tab 45 is an accurate reflection of the staffing and organization structure currently in effect at the Office of Community Services, HHS, to the best knowledge of the parties.

30. The material included at Tab 46 is an accurate reflection of the organization,

mission and functions of the Office of Community Services, HHS, currently in effect.

31. The material included at Tab 47 is an accurate listing of the personnel employed by the Office of Community Services, HHS, as of April 17, 1982, to the best knowledge of the parties.

32. The material included at Tab 53 is an accurate listing of the personnel employed by the Office of Community Services, HHS, as of May 10, 1982, organized by Office and annotated to show those who are former CSA employees, to the best knowledge of the parties at this time. Tab 53 does not include persons detailed to OCS.

33. Since October 1, 1981, HHS has separated by RIF 2,983 employees on the following dates: October 31, 1981 (Public Health Service hospitals in Norfolk, New Orleans, Nassau Bay (Tx.), and San

Francisco and some Public Health Service clinics); November 25, 1981 (Public Health Service hospitals in Boston, Staten Island, Baltimore and Seattle); December 12, 1981 (Public Health Service in headquarters and regions); January 23, 1982 (Office of Human Development Services in headquarters and all regions); April 17, 1982 (Office of Health Maintenance Organizations - headquarters and regions I through VI); May 1, 1982 (Office of the Secretary regional offices).

III. Transfer of Functions

Section 3503 of Title 5 of the United States Code provides:

(a) When a function is transferred from one agency to another, each competing employee in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.

b) When one agency is replaced by

another, each competing employee in the agency to be replaced shall be transferred to the replacing agency for employment in a position for which he is qualified before the replacing agency may make an appointment from another source to that position.

Determination of entitlement under subsection (a) initially requires (1) a decision as to whether an agency's function was transferred and if so, (2) which positions are "in the [transferred] function."

The parties agree that the loan fund, discretionary programs, close-out and inspector general functions transferred to OCS from CSA. They disagree as to whether OCS block grant and transition grant functions are new or transferred. We now examine the latter two grants.

CSA was responsible for administering portions of the Economic Opportunity Act of 1964, as amended, 42 U.S.C. 2941, for the purpose of eliminating poverty. 42

U.S.C. 2701. A large part of the agency's mission was accomplished through grants to community action agencies which could be "a state or political subdivision of a state ... or a public or private agency or organization which has been designated by a state" EOA, Title II, Part A. Although a state or subdivision could be a community action agency, that was not usually the case. (Tr. II-68, 170, 174, 196). Normally, CSA awarded grants to local community action agencies to carry out a particular purpose of the EOA, i.e., community food and nutrition. (Tr. II-65-66). These were termed categorical grants. The particular local community action agency dealt directly with CSA in obtaining the grants, and CSA exercised considerable oversight of the agency's performance. (Tr. II-169-170).

Under the Community Services Block Grant Act (CSBG) the involvement of OCS

with the local community action agencies is effectively restricted and the states assume the oversight and control functions to a large extent. ¶ 675, CSBG. The states apply to OCS, giving assurance that they will use the funds for the purpose set forth in ¶ 675 (c). The states are responsible for assuring proper disbursement of the funds. ¶ 675(c)(9).

While OCS does not have direct contact with or control of the ongoing programs, the HHS Secretary does have authority to withhold funds from any state which does not comply with the assurances given under ¶ 675. ¶ 679. The Secretary also is required annually to conduct an evaluation of the use of funds by several states. ¶ 679(b). Funds granted under these provisions are commonly known as block grants.

A plain reading of the CSBG Act and pertinent legislative history makes it

clear that the intent of CSBG was to reduce federal involvement and allow the states more control over the use of funds. See S. Rep. No. 97-139, 97th Cong., 1st Sess. 908-12. This does not mean, however, that the narrowed authority of OCS did not exist as a function within CSA when it was abolished.

The general mission of OCS is comparable to that of CSA, i.e., the granting of funds for the alleviation of poverty. (Tr. II-109, 169). The major difference between the two is the limited authority of OCS over how the granted funds are ultimately disbursed. OCS is by no means powerless to rectify specific problems, but in the main its function is to process grants with minimal involvement in the actual use of the funds.

The use of block grants is not a method of disbursement unknown to CSA. In fact, the difference between a categorical



and block grant can be a matter of wording in the funding statement. It is possible, for instance, to include a sufficient number of authorities in a categorical grant to effectively make it a block grant. (Tr. II-101). States previously had administered the energy program which was funded through CSA on a block grant basis. (Tr. II-170, 174, 179). Many states had state Economic Opportunity Offices which received grants from CSA. (Tr. II-173, 176).

The transition grant function arises when a state elects to have OCS operate, for fiscal year 1982 only, the grant programs under the EOA. In other words, the states can delay implementation of the CSBG by having OCS manage the grants as CSA would have. CSBG Act ¶ 682. (Tr. III-30). In such instances, OCS directly funds the local community action agencies. (Tr. II-111, III-30, 32).

"Function" is defined as "all or a clearly identifiable segment of an agency's mission, ... regardless of how it is performed." 5 C.F.R. ¶ 351.203(h)(i).

The grant functions of CSA were diminished by the CSBG. Categorical grants exist only in the transitional grant program and block grants require less Federal administration. Nevertheless, the grant functions are an "identifiable segment" of CSA which transferred to OCS.

The funds approved by Congress for the purposes set forth in the CSBG Act, which are essentially the same as those set forth in the EOA, will be disbursed by OCS in a simpler manner. However, the overall mission of both agencies was the disbursement of funds to be used in the local community for the alleviation of poverty. Now, states are given more control, but this does not alter the essential nature of OCS and CSA functions--disbursement of funds to alleviate poverty.

Fewer persons will be required to perform the functions of OCS because of its diminished responsibility, but those functions which remain are "transferred functions" even though they are not, in the aggregate, as extensive as the prior authority of OCS.

This is readily seen in the transition grant function. That function exists in FY82 and is nothing more than a continuation of CSA procedures until the states convert to block grants. The agency argues that it is a newly created function. That is not so. Certainly, the option to proceed either by block grant or by categorical grant is authority newly given to the states, but the function itself, once the option is elected, is substantially the same as that performed by CSA.

Accordingly, I conclude that the block grant and transitional grant

functions were transferred functions within the scope of 5 U.S.C. § 3503.

There is an alternative and equally compelling reason for finding for appellants on the issue of transfer of functions. Subsection(b) of 3503, supra, provides that when one agency replaces another each competing employee shall be transferred before the new agency may appoint from another source. The parties cited no case interpreting this subsection and further search was not fruitful.

In McNamara v. Dick, 323 F.2d 276,280 (D.C. Cir. 1963), the court said that the "congressional purpose [of the transfer of function provision] was thus to protect veterans who were affected by transfers of functions from one agency to another."4/ The current provision applies to all

4/See also, Hearings on H.R. 4115, 78th Cong., 2d Sess., before the Senate Committee on the Civil Service, May 19, 1944, p. 10.

"competing employees," not just veterans, but otherwise differs little from the prior provision. 58 Stat. 390; 5 U.S.C. ¶ 861 (1964). Clearly, the purpose of the provision is to protect employees from loss of employment when functions are transferred but not abolished. Colbath v. U.S., 341 F.2d 626 (Ct. Cl. 1965).

-Subsections (a) and (b) of ¶ 3503 provide for two distinct situations. Subsection (a) addresses a situation in which part of an agency is transferred. Subsection (b) addresses a situation when an entire agency is replaced, as it was in this case. A plain reading of subsection (b) supports the contention that it applies to this situation and all competing employees should have been transferred to OCS and appointed to positions for which they qualified before any other

appointments were made.5/

Respondent argues that the concepts of "replacement of an agency" and "transfer of function" have merged through years of application. The agency notes that OPM regulations and FPM material do not separately address the situation involving the replacement of an agency. Thus, respondent contends that there are no rights conferred by subsection (b) beyond those set forth in OPM regulations and instructions.

I cannot accept respondent's reasoning. The statute is clear on its face. Further, the statute was last amended in

5/Significantly, in the revision notes under 5 U.S.C. § 3503 in the bill recodifying title 5 of the United States Code it is pointed out that the word "receiving" in subsection (a) was substituted for "replacing" in the phrase "receiving agency" to avoid confusion with subsection (b). OCS was the replacing "agency." See Cong Rec. H 5651 (July 29, 1981) and FPM ch. 351, subch 5-2a, para (2)(a).

1979 6/ and the subsections were not combined. To accept respondent's reasoning would nullify subsection (b) totally.

This is contrary to the basic rules of statutory interpretation.

The fact that OPM has not promulgated interpretative regulations does not preclude recognition of the rights conferred by subsection (b). It may well be that regulations were deemed unnecessary since subsection (b) is easily applied as compared to (a) which requires more detailed analyses. Subsection (b) simply requires that former employees of the prior agency be placed, if qualified, in positions which are filled by the new agency before non-competing employees are hired. Thus, under (b) the transfer of "functions" analysis is unnecessary once

6/Pub. L. 96-54, ¶ 2(a)(18), August 14, 1979, 93 Stat 382.

it is determined that an agency has been replaced-by another.

Accordingly, I conclude that even if the block and transition grant functions were not transferred, the CSA competing employees had a right to be employed in continuing positions in OCS in accordance with the dictate of subsection (b).

IV. IDENTIFICATION OF EMPLOYEES

Office of Personnel Management regulations provide two methods for identifying competing employees 7/ with a transferring function. Under method one, an employee is identified with a transferring function if the employee performs the functions at least a major part of his time, or if the functions performed by the employee include the duties

7/A competing employee is defined as one in Tenure Group I, II, or III. 5 C.F.R. 351.203. See also 5 C.F.R. 351.501.

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controlling the grade or rate of pay of his position. 5 C.F.R. ¶ 351.303(c). Under method two competing employees are identified with a transferring function in the inverse order of their retention standing. 5 C.F.R. ¶ 351.303(d).

The agency claims that it was "impossible" to identify employees under method one due to inadequate information and that it therefore had the option of using method two. Further, the agency points out that the regulations contemplate a situation where some employees remain in a competitive area, so it considered all former CSA employees as volunteers to transfer under 5 C.F.R. ¶ 351.303(e) and selected employees in order of retention.

The agency was in error in considering method two to be an alternative to method one. "Method One must be used to identify each position to which it is

applicable." (emphasis supplied). 5 C.F.R. ¶ 351.202(b). OPM instructs, in the Federal Personnel Manual, that method two "is used when method 1 does not apply." FPM Ch. 351, Subch 5-3. The examples given under method two make it clear that method one does not apply to situations such as where a group of employees perform support duties for various functions (secretarial pool, for example), and either no one in the group works a majority of the time in support of the transferring function or the work in support of the function is not grade controlling.

Methods one and two are complementary ways to identify employees with functions. Two is not an alternative to one, but a different method to be used in situations where an employee cannot be identified under method one, as delineated in the

examples. The agency has not shown that method one did not apply.

The agency claimed that it was "impossible" to apply method one because the CSA position descriptions were so incomplete and out-dated that they could not be used to determine an employee's duties. This claim is unconvincing because the agency failed to establish that the position descriptions were worthless for this purpose and that the necessary information could not otherwise be obtained.8/

In its post-hearing brief, the agency stated that Vivian Olivari was the person who attempted to apply method one. Resp. Brief, 63, n. 35. Ms. Olivari testified

8/At page 63 of its post-hearing brief the agency argued that since all employees were identified as having "had some partial involvement with the transferring function, the question of identification under ¶ 351.303 became moot." This statement indicates there was no actual attempt to apply either method in the manner required.

that in the course of a study to identify which functions of CSA may have transferred to OCS she reviewed the position descriptions in detail. (Tr. II-29).

She said the descriptions were generally inadequate for the purpose of legally certifying the class and grade of the positions in the prescribed manner. She did not, however, review the position descriptions for the purpose of identifying the incumbents with functions under method one or method two. (Tr. II-36). Further, although it might have been difficult or time-consuming, she testified, the descriptions could have been updated retroactively through a "desk-audit" approach. (Tr. II-45).

Thomas M. King, who was acting personnel officer for OCS during the period in question, testified that Ms. Olivari

reviewed the CSA position descriptions to determine whether method one could be used. (Tr. II-51). On further examination, however, he said that there was a "joint decision" that method one could not be employed. (Tr. II-54). Ms. Olivari's input was apparently limited to her verbal comments to him about the state of the position descriptions. (Tr. II-53). Two persons named as participating in the joint decision were Mr. McFee and Mr. Mischel.

Mr. Mischel testified that he was "told" that the position descriptions were insufficient to apply method one. (I-60). Mr. McFee did not know who actually reviewed the position descriptions, but he did make the decision "to use method two..." (Tr. I-134).

I find that there was no detailed review of the position descriptions to see if they could aid in the application

of method one. While the descriptions may have been in poor condition, the agency has not shown that it attempted to update or supplement the position descriptions as needed, or that it was impossible to do so.

The agency's argument that it was disadvantaged due to the fact that CSA no longer existed when the HHS Secretary determined that certain CSA functions transferred to OCS is not meritorious. Had HHS earlier determined there had been a transfer of functions, it would have been able to obtain the necessary information with greater ease. However, the delay in ultimately making that determination was in no way attributable to appellants. Indeed, appellants' action in filing suit and obtaining an injunction forced HHS to change its initial conclusion that no transfer of function had occurred.

The agency also did not utilize method one.^{9/} Instead of using method two as a means of identifying employees who should be transferred, the agency used method two as a justification for using a general retention register to select employees. As noted previously, method two is a method of treating employees whose work is not limited to a single function but affects several functions, with the result that the employees cannot be identified with specific functions. Making a determination under method two requires the same type of information the agency claimed was impossible to obtain for use in method one, that is, the nature of the functions performed by the employee. The agency made no such determination as to any CSA employee. Indeed, the agency's expert

^{9/}The agency seems to concede this in its post-hearing brief. See note 2.

witness acknowledged that it did not identify employees through the use of method two. (Tr. I-54).

V. REDUCTION-IN-FORCE

The pertinent regulations provide that each competing employee in a position identified with the transferring functions is to be transferred to the new competitive area before a reduction in force is effected. 5 C.F.R. 351.302(a). If the gaining competitive area is to receive more employees than necessary, reduction in force procedures are used to "relieve the surplus." FPM ch 351, subch 5-5d(2). The competing employees have a right to transfer to the new area before it conducts a reduction in force. Id. However, the FPM provides that an actual physical transfer need not precede the RIF, but that "paper transfer" allowing the employees to compete can be accomplished and the excess employees can be

separated from the losing competitive area.

In the instant case the RIF conducted by CSA did not include competition for OCS positions and all employees were separated. Fact stipulation 12. Subsequently, the agency filled the positions it identified with transferred functions by selecting employees from a general retention register in each competitive area. Fact stipulation no. 24(e) and (f). The agency did not construct or apply competitive levels in the RIF. (Tr. I-36, 69). CSA employees selected to fill non-temporary position in OCS were given back pay from October 1, 1981. Fact stipulation 24(g).

The agency argues that although the RIF conducted by CSA did not include OCS positions, its later actions created a conceptual transfer allowing all CSA employees to compete for the remaining

positions. Further, it points out, since the hired employees received back pay, the agency's corrective action cured the effect of any error.

The agency's argument is unconvincing. First, the "conceptual" RIF did not include the use of competitive levels as required by 5 C.F.R. 351.403. Thus, there was no "first-round" competition by competitive levels, or separate retention registers for each level. 5 C.F.R. 351.404 and 351.501; FPM ch 351, subchs. 2 and 3. Of course there was no calculation of assignment rights since no employee was released from a competitive level. See Id. subch. 4; 5 C.F.R. 351.601 et. seq.

Respondent contends, however, that the failure to utilize competitive levels was not error because the position descriptions were inaccurate, and accurate competitive levels could not have been

constructed. As discussed infra, part IV, the agency's claim of impossibility is not convincing. It is not unusual for position descriptions to be inaccurate or outdated. OPM recognizes this by requiring agencies to update position descriptions before a RIF. FPM Ch. 351, App. A, para A-1b(5).

Accordingly, even accepting respondents' "conceptual" transfer argument and viewing the actions of CSA and OCS as a single, combined RIF action which occurred on October 1, 1981, the agency conducted the RIF erroneously in failing to construct proper competitive levels.

Also, as noted above, former CSA employees should have been allowed to compete for positions in the block grant and transitional grant functions.

VI. APPELLANTS' SUBSTANTIVE RIGHTS

Appellants argue that all former CSA employees should be "reinstated" as OCS

employees until they're properly separated. The appellants' rely on Losure v. ICC, 2 MSPB 361 (1980), and Ray v. Department of Air Force, 3 MSPB 516 (1980), to support their argument.

In Losure v. ICC, supra at 365, n.5, the Board noted that

Proper determination of an employee's entitlement under the RIF regulations is thus a substantive right of the employee, not merely a procedural requirement subject to the harmful error standard of § 7701(c)(2)(A). Subpart H of Part 351 sets forth the procedure which agencies must follow in carrying out a RIF, subject to the harmful error standard.

Thus, appellants argue, the agency's error in the application of the RIF regulations constitutes a violation of appellants' substantive rights and the removals should be reversed.

The appellants' position is bolstered by Fay v. Department of Air Force, supra, in which the Board reversed an employee's reassignment because it was found that

the appellant was improperly released from his competitive level while a person with lower retention subgroup was not released. The presiding official found the action to be procedurally defective but not constituting harmful error. The Board reversed the initial decision, concluding that the agency had not proved there was a properly conducted RIF satisfying the regulations, and that the issue of harmful error need not be addressed.

The Board has, however, stated that some procedural errors may be considered under the harmful error standard. In Cramton v. Department of Treasury, MSPB No. ATO 3510901312, March 17, 1982, the Board concluded that the agency erred in not involving RIF procedures. Instead of reversing the agency action, the Board remanded the case to afford appellant the opportunity "to present evidence on the merits of his appeal and show how he has been harmed by the agency's error."

In Foster v. Department of Transportation, MSPB No. DC03518010158 (Sept. 29, 1981), the agency erred when it constructed appellant's competitive level too narrowly. The Board stated:

When it is possible for the Board to ascertain from the record just which positions should have been included in what it finds to have been an incorrectly defined competitive level, and, further, where its review of those positions reveals that the agency's correct definition of the competitive level would have no difference affecting the employee's substantive rights, the agency's action in such a case will not be reversed on the basis of such an error. However, the instant case does not present that situation. On the record in this case, the Board cannot find that appellant's position was so unique as to justify a one-position competitive level. However, the record does not reveal what the proper definition of appellant's competitive level should have been. For this reason, the Board is unable to determine whether the agency would have arrived at the same decision had it correctly defined appellant's competitive level. Accordingly, the Board finds that the agency failed to prove, by the preponderance of the evidence, that it afforded appellant all of the rights to which she was substantively entitled.

The Board's reasoning in Foster implies that procedural errors will not result in reversal of an agency action if the record shows that the decision would have been the same if the error had not occurred. This, of course, is not quite equal to the harmful error standard since, under that standard, the appellant bears the burden to show that the error caused substantial harm to his rights. Parker v. Defense Logistics Agency. On the other hand, Cramton implies that the harmful error standard does apply to procedural error in RIF cases.

This quandry seems to flow from the above-quoted footnote in Losure. The difference between enforcing an employee's substantive rights and enforcing the RIF procedures from which those rights are derived is not clear. An error in application of the procedures logically implicates an appellant's substantive rights.

Therefore, requiring the agency to show that the error made no difference to the appellants' substantive rights is seemingly contrary to the normal application of the harmful error rule.

The cases might be harmonized, to some degree, if certain employee rights are viewed as substantive rather than procedural. For instance, an employee's placement in a properly constructed competitive level and area might be viewed as substantive rights while such things as the form of notice might be viewed as procedural. But this approach is not consistent with Cramton where RIF procedures were totally ignored by the agency even though they should have been applied. It also is contrary to the implication in Foster that the agency's error in constructing the appellant's competitive level would not have resulted in reversal had the agency shown the result would have been the same if done

In this case the agency made two errors: (1) there were no competitive levels; and (2) the competitive area did not include two transferred functions. The errors are certainly substantial and implicate appellants' substantive rights under the RIF regulations. Further, the agency position is that they currently do not have the information necessary to establish competitive levels. Thus, there is no way "to determine whether the agency would have arrived at the same decision had it correctly defined appellant(s') competitive level(s)." Foster supra. Therefore, I conclude that the agency did not accord the appellants their substantive rights when it effected the reduction in force.

VII. CONCLUSIONS

When one agency replaces another and assumes some or all of its functions as

well, competing employees in the agency being replaced shall be transferred to the new agency in positions for which they are qualified before others are appointed to those positions. 5 U.S.C. § 3503(b). Where, as in the instant case, the losing agency has more employees than needed to carry on the continuing functions and a reduction in force is therefore necessary, neither a paper transfer to the gaining competitive area nor a physical relocation of personnel is necessary. FPM Ch. 351, para. 5-3e. Employees of the losing agency who cannot be identified with transferred functions in the manner required by the regulations may be separated (id. para 5-3f), whereas employees whose functions survive in the gaining agency are entitled to compete for the available, continuing positions in accordance with the usual reduction-in-force procedures.

The Government erred in failing to accord CSA employees the benefits of the procedures required by law, as outlined above. First, it failed to identify CSA employees with functions taken over by OCS from CSA. When, subsequent to the replacement of CSA, the respondent attempted to grant rights to former CSA employees, the method of determining which employees would be offered assignment to available positions in OCS did not comply with the regulations, in that a general list of employees in retention preference order was employed rather than properly established retention registers. Further errors were the exclusion of the block grant and transition grant functions from the several activities deemed to have transferred from CSA to OSC, and the consequent denial of the employees' right to compete for positions in those functions. While certain employees have

been accorded their rights retroactively -- and the respondent apparently has continued to place former CSA employees where this has been possible -- the remedies available to appellants who have not had the benefit of their procedural rights under the law and regulations must be examined. Granting of relief to them is complicated by the evident inability of the respondent, and of the Board as well, to find the facts necessary to reconstruct the critical relationships that establish retention rights as of September 30, 1981.

Ray and Foster, supra, and related decisions of the Board require the conclusion that all appellants are entitled to be restored to their federal employment as of October 1, 1981 because of the failure of the Government to follow the procedures by which their substantive rights, i.e., their rights under the retention

preference system, are determined. However, their right to be retained in that employee status continues only until there is a proper assessment of their retention rights in conformity with law. I find that the determination of appellants' rights by use of the master retention register in early 1982 must be accepted as being in compliance with law, except with respect to the failure of the agency to offer placement in positions identified with the block grant and transition functions. Accordingly, the agency will be directed to provide opportunity, using the same method, for employees to be assigned to continuing OCS positions that the agency finds were necessary to carry out the block grant and transition grant functions.

Since it is virtually impossible in this case to reconstruct a properly administered reduction in force on a

retroactive basis for the purpose of ascertaining the relative retention standing of employees, I conclude that the Board should ratify and adopt the agency-designed RIF procedure, i.e., the master retention register, as the most expedient and equitable solution. Under this approach, I believe recovery of backpay from October 1, 1981 should cease as of the date the first offers of employment were transmitted to appellants in January 1982; as of that date a valid reduction in force is deemed to have been instituted, thus fixing the rights of the appellants, even though notices of non-selection were sent to some at a later date. This cutoff date varies from the one discussed in the brief of appellants' counsel in the context of remedial action. In the brief it is suggested that the date of March 5, 1982, when notices of non-selection were mailed, should

apply if the master selection list method is approved by the Board. Appellants' Post-hearing Brief, Part IV, at 64-66. In my view, the earlier date is consistent with the theory of a constructive reduction in force in which the competing interests of CSA employees were determined and settled when the master register was established.

I am reluctant to prescribe any further remedies in this decision. The Board may reach different conclusions of law, and it could hold that those employees who were not reached for placement in continuing positions are not entitled to backpay. When the partial initial decision is taken up for review by the Board, the parties will have an opportunity to address the legal conclusions as well as any problems that various remedies might present. The parties should also have the opportunity, provided for in the

Board's consolidation order, to show differences in individual cases that may warrant special treatment.

NOTICE

A petition for review of this decision may be filed by the agency or by the lead counsel on behalf of appellants within 35 days of issuance of the decision in accordance with 5 C.F.R. §§ 1201.114-115.

Dated: August 20, 1982

John J. McCarthy
Chief, Administrative Law Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CERTAIN FORMER COMMUNITY)
COMMUNITY SERVICES)
ADMINISTRATION EMPLOYEES,)
ADAMS, et al. Appellants.)

v.)

DOCKET NUMBER
AT03518210251*

DEPARTMENT OF HEALTH)
AND HUMAN SERVICES,)
Respondent.)

OPINION AND ORDER

This case comes before the Board pursuant to separate petitions for review filed by the Department of Health and Human Services (HHS), and on behalf of approximately 2971/ former employees of the Community Services Administration

1/ Originally seventy-eight other appellants were part of the consolidated case at the initial level. However, pursuant to agency filed motions to dismiss those individual appeals based on the absence of Board jurisdiction, those appeals were dismissed and are no longer considered part of this consolidation.

(CSA) identified in Appendix A. 2/ The chronology of events leading to the petitions for review is as follows.

The CSA operated grant programs pursuant to the authority of the Economic Opportunity Act of 1964. 42 U.S.C. § 2701 et seq. 3/ In July of 1981, the Director of CSA distributed general notices of reduction in force to all CSA

2/ The petition for appellants was submitted by Janice M. Xaver. Ms. Xaver was initially retained by the National Council of CSA Locals (American Federation of Government Employees) and she served as lead counsel at the initial level.

3/ The Economic Opportunity Act of 1964, 42 U.S.C. § 2701, et. seq., established the Office of Economic Opportunity (OEO). In 1974, the Community Services Administration was established as an independent agency, P.L. 93-644, Headstart, Economic, and Community Partnership Act of 1974, 88 Stat. 2291.

*Partial Initial Decision was issued under Docket Number HQ12008110063.

employees. The notice advised the employees of the possibility that as of September 30, 1981, the agency would no longer be funded. Subsequently, on August 13, 1981, the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, (Budget Act) was signed into law by President Reagan. Title VI of the Budget Act abolished CSA as an independent federal agency effective October 1, 1981. Under date of August 21, 1981, all CSA employees were issued specific notices of reduction in force which advised them that CSA programs would be funded by block grants, that their positions were abolished and that they would be separated as of September 30, 1981. 4/

4/ The notice was issued under the signature of Dwight Ink, the Director of CSA. Stipulation #3.

On September 12, 1981, the appellants filed a complaint in the United States District Court for the District of Columbia contending that CSA employees had the right under 5 U.S.C. § 3503 to transfer to the Department of Health and Human Services. The appellants also filed a motion with the the court for a preliminary injunction to prevent HHS from filling positions that were allegedly transferred to the newly established Office of Community Services (OCS). That office was established as an operating division in the Department of Health and Human Services on September 30, 1981. On October 13, 1981, a preliminary injunction was issued by the court preventing the agency from filling in OCS. Subsequently, on October 16, 1981, the court ruled that Congress had not exempted the transfer of function from the Veterans' Preference

Act.5/ The court made no specific determination of what functions transferred to HHS, but concluded that the appropriate remedy was for the employees to exhaust their administrative remedies before the Merit Systems Protection Board.

Thereafter, the Board assigned the case to its Chief Administrative Law Judge (ALJ). After the completion of discovery, the ALJ afforded the parties a hearing on the common issues of law and fact. The ALJ rendered his partial initial decision (PID) on August 20, 1982. The ALJ concluded that all the functions of CSA transferred to OCS. 6/ He also found that CSA

5/ National Council of CSA Locals, American Federation of Government Employees (AFGE) AFL-CIO v. Schweiker, 526 F. Supp. 861 (D.D.C. 1981).

6/ The parties agreed that a transfer of function occurred with respect to the closeout, Inspector General, discretionary programs, and loan fund activities.

was replaced by OCS and that the agency erred in failing to comply with the pertinent regulations and procedures both as to the identification of employees with the transferred function and the subsequent reduction-in-force procedures resulting from the transfer.

Notwithstanding the noncompliance with the regulations regarding the identification methods used by the agency in effecting the the transfer, the ALJ urged acceptance of the procedure in light of the fact that it was "virtually impossible in

Stipulation #23. In addition, the ALJ found that both the "block" grant and the "transition" grant function transferred from CSA to OCS. A block grant is one that is authorized by the Community Service Block Grant Act whereby funds are specifically awarded to the states for disbursement. A transition grant is where the states elect to have OCS disburse the funds awarded to various Community Action Agencies within the states in the same manner as was done by CSA. The transition grant was authorized for fiscal year 1982 only.

this case to reconstruct a properly administered reduction in force." PID at 23. The ALJ further concluded that the appellants were entitled to back pay from October 1, 1981 until the date that offers of employment were first transmitted to the appellants in January 1982. PID 23-24. The petitions for review are hereby GRANTED. 5 U.S.C. § 7701 (e)(1).

ANALYSIS

The issue before the Board is whether a transfer of function has occurred. Before examining the functions now performed by OSC and determining whether those functions transferred from CSA, however,^{8/} we begin our analysis by examining the

^{8/} This approach is completely consistent with one of the earliest interpretations of transfer of function contained in the United States Civil Service Commission Cir. No. 740, dated January 24, 1954. That circular stated: "The test as to whether there was a transfer of function . . . (a) depends upon a judgment as to whether, in

term "function". Although this term evolved from the Reorganization Act of 1939 (53 Stat. 562) and the Veterans' Preference Act of 1944, neither of those statutes Preference Act of 1944, neither of those statutes defined function. 9/ Subsequently, the former Civil Service Commission defined function as "all, or a clearly identifiable segment of, an agency's mission (including all integral parts of that mission), regardless of how it is performed." 5 C.F.R. § 351.203 (c).

conjunction with a reduction in force, a function or functions of one organizational entity can be identified as having been transferred to another organization entity."

9/ The regulations adopted by the Civil Service Commission to implement section 12 of the Veterans' Preference Act merely copied the statutory language. 5 C.F.R. § 12.306 (1944 Supp.). No attempt was made at the time by the Commission to define or otherwise explain what was meant by the term function.

Although this definition may be imprecise, we see no reason to disregard it or alter this definition since it has been utilized by both the Commission and the Office of Personnel Management. However, we will examine in detail the past application of this term in order to provide guidance to resolve this case.

In McNamara v. Dick, 323 F.2d 276, (D.C. Cir. 1963) cert. denied, 84 S.Ct. 171 (1963), the court held the term had to be associated with the "authority, powers and duties" that an agency was "expressly authorized by law" to perform. Therefore, a function has to be a clearly identifiable activity of the agency's mission which consists of substantial authorities, powers, and duties authorized by law which combine to form a segment of the agency's mission. Enos v. Macy, 321 F.2d 748 (D.C. Cir. 1963). In addition,

there must be either a quantitative or qualitative method of identifying the activity as a function. This is necessary in order to ensure traceability when the function is transferred from one entity to another.

Therefore, it is the functional activities that are described in an agency's enabling legislation, organization manuals, and delegations of authority that are clearly of most significance in determining whether a function has been transferred. Such documents describe the general activities that form the nucleus of the agency missions from which all other activities stem.

Once the functions of any two entities are isolated in this fashion, the function of the first entity can be traced to determine whether the function has been

transferrd or otherwise disposed of,^{10/} as envisioned by the transfer of function regulations. See 5 C.F.R. § 351.203 (h) (1).

Although the ALJ concluded that the "block grant" function transferred from CSA to OCS, we find insufficient credible evidence to support this conclusion. The ALJ relied on the legislative statement of an agency's purpose as determinative in resolving the transfer of function issue. While an agency's general "manifesto" of its purpose is relevant, it cannot, in and of itself, be a function. Such a statement provides insufficient information to ascertain the actual and specific "authorities, powers and duties"

^{10/} 5 C.F.R. § 351.302 (b) provides that a function transferred solely for liquidation does not entail any retention benefit to the employee identified with the liquidated function.

that form the central operations performed by an agency. The "manifesto" is not a segment of the agency's mission but rather the result desired. Its intangible nature precludes any type of measurement and the traceability envisioned by the transfer of function regulations. 5 C.F.R. § 351.303. Moreover, the adoption of such an approach over-simplifies the complexities of government and understates the assortment and possible duplication of activities performed by agencies.

While the enabling legislation is of some value, the performance of a particular activity is of far more relevance. Thus, if the evidence shows that the functions performed by CSA and OCS are interchangeable and are now being performed by OCS, a transfer of function has been accomplished. On the other hand, if the evidence shows that the functions of OCS are new and different, the result

must be that no transfer of function has taken place. Our task has been simplified by the stipulations concerning four of the functions that have transferred to OCS. See note 6, supra. There remain in dispute, the "block" and "transition" grant functions. We must proceed to examine the functional statements of authority, available organizational information and the enabling legislation and its history of both agencies in order to facilitate resolution of the transfer issue.^{11/}

BLOCK GRANT FUNCTION

CSA, as the successor to the Office of Economic Opportunity, inherited the functional responsibility of awarding

^{11/} The Office of Personnel Management has intervened and submitted a brief in support of the agency's position relating to the "block" grant issue.

grants and administering grant programs. Economic Opportunity Act of 1964 (EOA), as amended, 42 U.S.C. § 2701. It is clear that CSA was established as an independent agency. Title VI, § 601 (c), 42 U.S.C. § 2941 (c). The administrative functional authority of the CSA Director was substantial. Tr. II, 64 106. CSA fulfilled its obligations under the EOA awarding grants directly to Community Action Agencies (CAAs) within the states. EOA, Title II, Part A. These specific grants were generally labeled as "category" grants.

A review of the enabling legislation for the Budget Act,^{12/} discloses that the Director of OCS, through delegations

^{12/} More precisely, the section under dispute is known as the Community Service Block Grant Act (CSGA), § 671 of the Budget Act.

from the Secretary of the HHS,^{13/} is authorized to "make grants . . . to the States". Section 672 (a). Section 675 (c) (8) provides that the States will coordinate the anti-poverty programs in each community.

A comparison of the organizational structure and the specific delegations of authority for CSA with the delegations of OCS reveals significant differences in content and substance.^{14/} CSA had authority to select and award specific grants

^{13/} Section 676 of the CSGA established an Office of Community Service within the HHS to perform the functions of the Secretary consistent with the provisions and limitations outlined by the specific provisions of the statute.

^{14/} Such a comparison also entails a review of the EOA and the CSGA since the authority for the activities performed stems from the various provisions of those statutes.

to CAAs^{15/} whereas OCS does not. These grants were awarded by CSA consistent with and subject to detailed standards and regulations (45 C.F.R. Subpart B, Chapter X), which were directly administered by CSA. OCS issued no standards or regulations and the grants funded are directly administered by the states. CSA formulated policies, procedures and guidelines controlling of how the grantees would utilize the funds provided. Conversely, OCS does not formulate policies or procedures, or otherwise directly control the specific methods by which the CAAs or other grantees utilize the allocated funds. CSA's oversight responsibilities entailed substantial monitoring and auditing proce-

^{15/} CSA awarded these grants to the CAA's to promote and carry out specific programs consistent with the EOA. (Tr. II, 58, 61, 62, 65-66, 68).

dures to ensure compliance with its established standards and regulations. In contrast, OCS's oversight responsibility is limited and its control over the expenditure of funds is severely restricted. Tr. II, 107-8. The CSA Director was granted broad authority and was responsible for the coordination of all anti-poverty programs. Tr. 65, 106.^{16/} The Director of OCS retains only limited au-

^{16/} The PID understated the full scope of the administrative responsibilities performed by CSA. For example, an analysis of the EOA indicates the extent of these activities: CSA was charged with the responsibility of designating CAAs, section 210; assuring that CAAs have appropriate plans and evaluate the various programs, initiated and sponsored projects responsive to the unmet needs of the poor; establishing procedures by which the poor could influence the programs affecting their interest; and encouraging the participation of business, labor and other private groups, section 212; establishing criteria for community action programs, section 210 (a)(3); providing technical assistance to communities and training for personnel, section 230; achieving an equitable distribution of local initiative

thorities and the coordination of the anti-poverty programs is specifically designated to the state entities. CSGA, § 675 (c) (h).

Unlike the original authorization to CSA of broad administrative powers and responsibilities, the legislative history of the Budget Act contains strong language manifesting the breadth of the Congressional limitations placed on the newly established OCS. Congress unequivocally expressed its desire to abolish CSA and establish a new function:

The Conference emphasizes that the Community Services Administration as an agency is terminated and that the

funds between urban and rural areas, section 214; and auditing each grant or contract at least once annually, section 243. Further, the Director, pursuant to Title VI, was required to set standards for the wages of laborers and mechanics employed by contractors and sub-contractors and the wages of persons employed in carrying out programs financed under Title II, section 607 and section 610.

Community Service Block Grant Function is a new program within the Department of Health and Human Services, not a transfer of authority.

H.R. Rep. No. 208, 97th Cong., 1st Sess. 767-768 (1981). A similar view is expressed in the Senate Report.

To emphasize the committee's commitment that the Federal government shall not burden the State's administrative structure, the committee has in several places in the block grant bills stated exactly what paperwork and reporting requirements it has in mind. In each case they are straightforward and easy to comply with, designated to provide necessary accountability without detracting from the state's authority to allocate the block grant resources. The committee's bills are meant to be definitive with regard to paperwork, reports, and accountability. The Secretary is specifically directed not to interpret these requirements by regulation or otherwise go beyond the explicit boundaries of the limited federal role clearly defined in the bill. For example, the committee intends that the application be extremely simple. The Secretary should submit to the states an application that plainly lists the assurances required in the statute. The governors should be required only to sign and date the application and return it to the Secretary.

S. Rep. 97-139, 97th Cong., 1st Sess. 908, reprinted in 1981 U.S. Code Cong. & Ad. News, 932.

The expanded role of the state entities was also highlighted:

The Act places greatly increased responsibilities on State governments to design and administer effective programs while assuring against development of large state bureaucracies and failure to deal with poverty problems at the community level. The Act requires the Chief Executive of the State to certify that funds will be used for a variety of specific, eligible purposes, sets a strict limit on state administrative expenses, and requires special consideration for existing Community Action Agencies, or other community based organizations, provided they are able to meet appropriate program and fiscal requirements established by the State. This encourages States to continue funding effective Community Action Agencies, while recognizing that, if the States are to be held accountable for the effectiveness of programs, they must have flexibility in selecting agencies to be funded, in requiring those agencies to meet certain accepted standards.

Id. at 912, 1981 U.S. Code Cong. & Ad. News at 936. The Senate Report also

specified the intent to restrict federal involvement:

As is clear, the committee intends that States be provided with the broadest possible latitude in the use of block grant funds and be free from all but the most minimal and necessary federal administrative and regulatory direction. Nonetheless, the expenditure of federal funds, as all contracting relationships, must be accompanied by some accountability that funds are not misdirected or fraudulently used. The Secretary is specifically empowered to withhold funds, but only if the State has misused funds by a substantial and serious failure to carry out its assurances and the general requirements of the statute. Such withholding cannot be made for minor or insubstantial deviations or without adequate notice and opportunity for a public hearing to be conducted with the affected state and at which all interested parties are represented.

Id. at 909, 1981 U.S. Code Cong. & Ad. News at 936. This intent was acknowledged by the minority view:

We are particularly troubled by the Committee's action to eliminate the Community Services Administration, transfer only a portion of its program authority to the Department

of Health and Human Services, and channel what limited funding is provided through the states.

Id. 935, 1981 U.S. Code Cong. & Ad. News at 949.17/

The desire of Congress to establish a new function whereby state entities would be responsible for the operation and implementation of the various grant programs is clear. The legislative history, when coupled with the drastic changes in the new authorities, powers, and responsibilities of OCS can only lead to one conclusion: the category grant function performed by CSA is no longer in existence and the block grant function is a new and distinct function. Moreover, had the Congress intended to continue CSA and its assortment of duties and responsi-

17/ During consideration of the "Budget Act" the Senate requested an amendment to extend the Economic Opportunity Act but this was rejected.

bilities, it is unlikely that it would have repealed EOA. But the Congress did repeal EOA and substantially modified some activities performed by CSA and clearly eliminated others. The category grant function and all its authorities, powers, and responsibilities now rest with the state entities. Accordingly, we conclude that the ALJ erred in his determination that the "block" grant function transferred to OCS.18/

18/ The ALJ indicated that CSA had in fact authorized a number of "block" grants and expressed the view that the difference between a categorical and block "can be a matter of wording in the funding statement". PID at 10. This conclusion ignores the type of control exercised by CSA over such grants and the fact that by far the majority of grants awarded for CSA were category type grants. The isolated awarding of a block grant for a limited period of time by CSA is insufficient to support the conclusion that the CSA, in the ordinary course of business, performed a block grant function. In fact, the evidence of record is to the contrary.

TRANSITION FUNCTION

The ALJ found that the transition transferred from CSA to OCS. The Budget Act provided that the states could delay the implementation of the provisions of that Act by electing to have OCS directly fund the local community action agencies for fiscal year 1982. CSGA Section 682. We agree with the ALJ's findings in regard to this function. Most of the ingredients of a transfer of function that were lacking in the block grant activity are present in the continuation of the transition grants, at least for the fiscal year 1982. The Budget act specifically provided that the state entities could elect to have OCS continue to administer grant programs in the same manner as CSA. In essence, the law provided OCS for a limited period of time with the same authority, powers and duties as CSA. These

circumstances, when viewed in light of the transfer of function regulations, clearly establish that the transition function is identical to the function that was performed by CSA and therefore the assumption of that function by OCS constituted a transfer of function.

The ALJ also concluded that even in the absence of a transfer of function of the block and transition activities, the CSA competing employees had a right to be employed in a continuing position in OCS. The ALJ based this conclusion on 5 U.S.C. § 3505 (b) which provides:

When one agency is replaced by another, each competing employee in the agency to be replaced shall be transferred to the replacing agency for employment in a position for which he is qualified before the replacing agency may make an appointment from another source to that position.

The ALJ's interpretation of § 3503 (b) is questionable in light of the se-

quence of events leading up to the abolishment of CSA and the subsequent establishment of OCS. As previously indicated, Congress clearly intended to abolish CSA and expressed the view that OCS was a new agency which had functions distinct from CSA. See pages 9-11, supra. Our finding with respect to the block grant function is consistent with that congressional intent and with the drastic changes that took place with the creation of OCS. The ALJ's application of this provision would require an agency to retain employees who have not been associated with the performance of a function that has been newly created by Congress. Likewise, this position is not consistent with specific provisions of the transfer of function regulations which provide that the employees identified with the performance of a function are entitled to trans-

fer with that function to the gaining agency.

A transfer of function can only occur when a continuing function is moved from one competitive area to another. 5 C.F.R. 351.203 (h)(i). A function is deemed transferred when it disappears or is discontinued at one location and appears in identifiable form at another location. The replacement theory relied on by the ALJ is not applicable in this case because a large segment of CSA's "authorities, powers and duties" have not continued in an identifiable form at a new location. In essence, the major functions performed by CSA were abolished and specific entitlement to compete for positions in OCS is contingent upon a showing by the individual employees that the function with which they were identified has reappeared at OCS.

Accordingly, we find that the ALJ erred in his alternate finding that the employees were entitled to transfer of function rights under 5 U.S.C. § 3503 (b).

This is not say, however, that some individual appellants may not show that the specific function with which they were identified have been transferred, and that they have entitlement under 5 C.F.R. 351.303 to a continuing position at OCS.

Identification

As noted, a transfer of function is "the transfer of the performance of a continuing function from one competitive area and its addition to one or more competitive areas". 5 C.F.R. 351.203 (h)(1). Moreover, 5 U.S.C. § 3503 specifically provides:

When a function is transferred from one agency to another, each preference eligible employed in the function shall be transferred to the re-

ceiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.19/

5 C.F.R. § 351.302 (a) provides:

(a) Before a reduction in force is made in connection with the transfer of any or all of the functions of a competitive area to another continuing competitive area, each competing employee in a position identified with the transferring function or functions shall be transferred to the continuing competitive area without any change in the tenure of his or her employment.

Consequently, if the transfer of function requires a reduction in force in the losing agency, the employees identified with the function must be afforded the opportunity to transfer with that function to the gaining agency. Significantly, a losing agency is not obliged to conduct a reduc-

19/ Conversely, employees in the losing agency identified with the transferred function have no statutory right to remain with the losing agency.

tion in force to accommodate employees who refuse to transfer with their function.^{20/} A transfer of function may result in the transfer of an entire staff of an organization. However, if the gaining agency discovers that the transfer of function entails the acquisition of more employees than are needed to perform that function, the gaining agency may find it necessary to have a reduction in force. In this situation the incoming employees not only have a right to compete among themselves but also are entitled to compete with other employees already engaged in the performance of that function. Significantly, the gaining agency is to treat

^{20/} The logic here is apparent. Since the losing agency no longer has responsibility for the performance of the transferred functions, it should not be required to disrupt its continuing mission by being compelled to have a reduction in force.

those incoming employees as its own for reduction in force purposes. The rights of the incoming employees are protected by merging the retention registers of the segment that is being transferred with the retention registers of the gaining agency. The employees not only compete for retention during the first round of competition, but also have rights of assignment in the second round of competition.^{21/} To assist agencies in the

^{21/} The first round of competition entails the process whereby employees compete within their respective competitive levels. The second round of competition relates to those employees who have been released from their competitive levels and are afforded assignment rights consistent with 5 C.F.R. § 351.703. In this connection it is significant to note that a transfer of function does not require the actual physical transfer of all employees to the gaining agency. Where, as in this case, the gaining agency determines that there will be a surplus of employees, the losing agency may act as

accomplishment of this consistent with the RIF procedures, OPM has promulgated regulations which outline two methods of identifying positions with a transferring function.^{22/} The regulations envision that the identification of employee will occur prior to the actual transfer of function. There is no dispute that upon invoking the transfer of function procedures, the agency failed to utilize either of the permissible methods of identification. The agency attempts to justify

agent for the gaining agency in separating those employees who unsuccessfully compete for retention at the gaining agency. See Smith v. Department of Commerce, MSPB Docket No. AT03518210352 (March 1, 1984).

22/ These regulations provide:

§ 351.303 Identification of positions with a transferring function.

- (a) the competitive area losing the function is responsible for

its noncompliance by contending that the the identification procedures used were appropriate due to the unique circum-

identifying the positions of competing employees with the transferring function. Two methods are provided to identify employees with the transferring function:

- (1) Identification Method One; and
- (2) Identification Method Two

(b) Identification Method One must be used to identify each position to which it is applicable. Identification Method Two is used only to identify positions to which Identification Method One is not applicable.

(c) Under Identification Method One, a competing employee is identified with a transferring function if:

- (1) The employee performs the function during all or a major part of his or her work time; or
- (2) Regardless of the amount of time the employee performs the function during his or her work time, the function performed by the employee includes the duties controlling his or her grade or rate of pay.

stances in this situation.23/-In lieu of the required procedures the agency adopted procedures which consisted of considering all former CSA employees as being identified with the functions transferred to OCS. Stipulation 24 (a). The agency then identified all positions in OCS which involved a continuation of a function performed by CSA. Stipulation 24 (c). Fi-

(d) Under Identification Method Two, competing employees are identified with a transferring function in the inverse order of their retention standing.

23/ The agency contentions regarding the impracticability of utilizing the prescribed methods of identification have little merit. The agency's efforts merely consisted of assigning a personnel specialist a period of two weeks to review the position descriptions of the CSA. In addition, the main purpose of this assignment was not to identify CSA employees with various continuing functions but was to identify functions that were similar to the functions now performed by OCS. Tr. Vol. II 36.

nally, the agency developed master retention registers of competing employees and extended offers of assignment to the highest ranking employee on the appropriate register for each of the designated positions.24/

An examination of the record in this case reflects that while the agency attempted to identify the functions that were to continue at OCS, it failed to match those continuing functions with any individual employee who had been identified with that function prior to the transfer. This was error and circumvents the retention preference order established

24/ A retention register was prepared for the Headquarters and each of the Regional Offices.

by the regulations.25/ As previously noted, in a transfer of function, the operation of the function must cease in one competitive area and be carried on in another competitive area. Therefore, a function is transferred when it disappears in one location and appears in an identifiable form at another location. In contrast, a function which is discontinued does not appear at another location. Em-

25/ We specifically reject the agency's contention that it is impossible to determine identification of the employee because of inaccurate position descriptions. There is ample evidence available in the file concerning the organization and functional activities of CSA. In addition, we note that many of the positions within CSA were identical and located in the same organization. See generally, Hurley v. United States, 575, F.2d 792 (10th Cir. 1977).

In addition, we note it is somewhat paradoxical for the agency to assert administrative impracticability with respect to the identification of CSA employees while asserting that it was successful in identifying the function that continued with OCS. Tr. Vol. II, p 30.

employees whose positions are liquidated and who are not identified with an operating function specifically authorized at the time of the transfer are not competing employees for positions at the gaining agency. 5 C.F.R. § 351.302 (b). Moreover, the transfer of function regulations contemplate that only those employees whose functions are continuing in the gaining agency (OCS) are entitled to compete for retention. See pages 4-5, Supra.

The proper identification of employees in a transfer of function is vital to the entire scheme established by the regulations, in that the rights of the individual employees for retention are established at this stage. Significantly there is an obligation placed upon the agency to ensure the propriety of the identification process. The agency is required to be particularly sensitive in

identifying employees with a continuing function. Hurley v. United States, 575 F. 2d 792, 797 (10th Cir. 1977). Accordingly, we find that the agency was remiss in meeting the responsibilities and obligations imposed by the regulations. 5 C.F.R. § 351.303.

Our finding regarding the transfer of function, see pages 6-13 supra, is sufficient to establish the agency's initial burden of justifying the need for the reduction in force. Losure v. Interstate Commerce Commission 2 MSPB 361 (1980).26/

26/ In Losure, the Board adopted a three step formulation that is applied in adju-First, the agency has the initial burden of establishing that the RIF action was initiated for appropriate reasons. Second, the appellant has the burden of moving forward by presenting specific exceptions to the action. The third stage calls for the agency to present evidence confirming that the action was effected in accordance with the reduction-in-force regulations.

The focus of the inquiry now moves to the identification process where there primary question is one of retention, i.e., which of the former CSA employees have superior rights of retention with OCS. Our finding of error in the identification process does not permit us under the circumstances in this case to invalidate the entire reduction in force.27/ Although 5 U.S.C. 3502 establishes rights among employees and promotes competition for retention, it does not create an absolute statutory right of continued employment. American Fed. Govt. Emp., AFL-CIO v. Stetson, 460 F.2d 642, 645 (5th Cir. 1981).

27/ CSA employed over 900 individuals and OCS now employees less than 300, many of whom are not associated with the functions that have been transferred to OCS. Under these facts it is apparent that all the employees who were affected by the reduction in force would not have been retained in any event.

Where, as in this case, the ultimate question for resolution relates to the retention of substantially fewer employees than were necessary prior to the transfer, the agency's noncompliance with certain provisions of part 351 does not warrant unconditional reversal of the entire reduction in force since many of those employees would have been subjected to separation from the federal service in any event. However, the agency is not relieved from its obligation to establish, when raised by an individual appellant, that no infringement of that individual's substantive rights occurred. Wilburn v. Department of Transportation, MSPB Docket Number, DC03518210059 (February 23, 1984).

The effects of this agency error as it relates to each appellant have yet to be determined. Upon remand, each individual appellant must be afforded an

opportunity to present with some degree of specificity, evidence which tends to establish that he was denied retention to which he was otherwise entitled under 5 C.F.R. 351.303. Debold v. Department of the Navy, 9 MSPB 95 (1982). It is therefore incumbent upon each appellant to assert that he was identified with a continuing function that is now being performed by OCS. Jackson v. National Transportation Safety Board, MSPB Docket No.

DC03518110850, (January 9, 1984). In addition, the appellant must identify a position or positions for which he was qualified that have been assigned to other employees with less retention standing or positions occupied by employees who had no initial entitlement to transfer. Jackson, supra, at 4. Once these factors have been established by the appellant, the agency may refute the contentions made or

prove that that appellant's rights have not been abridged by showing that notwithstanding the evidence, the appellant would not, in any event, have been retained. Speaker v. Department of Education, 11 MSPB 430 (1982). Should an individual appellant present evidence that tends to establish that he was denied retention to which he was otherwise entitled under 5 C.F.R. 351.303 and the agency is unable or unwilling to refute such evidence by showing it to be untrue or that his retention standing would not have provided such benefit, the appellant would prevail.

28/ The ALJ's determination on the back pay issue was premature. Since there has been no specific finding of an unjustified or unwarranted personnel action, See Crimaldi v. United States, 651 F.2d 151 (2nd Cir. 1981), no back pay may be awarded at this time. However, should any of the appellant's prevail, retroactive restoration will be required by the presiding official.

419a

Accordingly, the individual appeals are now remanded to the respective Regional Offices for processing consistent with this OPINION and ORDER.29/

JUN 18 1984

(Date)

/S/

PAULA A. LATSHAW
ACTING SECRETARY

Washington, D.C.

29/ It is anticipated that during the proceeding below, the agency will provide access to available documents to those appellants seeking to establish a valid claim to a continuing position with OCS.

NATIONAL COUNCIL OF CSA LOCALS AMERICAN
FEDERATION OF GOVERNMENT EMPLOYEES
(AFGE) AFL CIO, Plaintiff,

v.

RICHARD S. SCHWEIKER individually and
in His Official Capacity as Secretary
of Health and Human Services, Defendant.

No. Civ. A. 81 2267.

United States District Court,
District of Columbia.

Oct. 21, 1981.

MEMORANDUM

JOHN GARRETT PENN, District Judge.

This case is now before the Court on
plaintiff's motion for a preliminary
injunction.^{1/}

^{1/} The Court entered a temporary
restraining order on September 22, 1981,
and scheduled a hearing on the plaintiff's
motion for a preliminary injunction on
October 2, 1981. The hearing was
subsequently rescheduled for October 1.
The Court heard arguments on the motion

(Footnote continued on next page.)

I.

Very briefly, the underlying facts are as follows: The Community Services Administration (CSA) was established to administer programs designed to eliminate poverty. In August 1981, Congress passed the Omnibus Budget Reconciliation Act of 1981 (Budget Act), Pub. Law 97 85, which

(Footnote continued from next page.)

for preliminary injunction on October 1. On October 2, the Court extended the temporary restraining order until October 12, 1981, and directed the parties to file additional memoranda and affidavits on certain issues raised during the October 1 hearing. The defendant and plaintiff filed further submissions on October 5 and 7 respectively. On October 9, 1981, the Court extended the temporary restraining order until October 14, 1981 at 4:00 p.m.

The temporary restraining order was clarified by the Court's orders dated October 1 and October 9 which provided that the temporary restraining order did not preclude defendant from using current

(Footnote continued on next page.)

terminated CSA effective September 30, 1981, and made a number of changes in the administration of the anti poverty programs. Effective October 1, 1981, the Department of Health and Human Services (HHS) assumed responsibility for administering most, if not all, of the programs previously administered by CSA.

(Footnote continued from previous page).

Department of Health and Human Services employees "on a purely temporary basis to perform the tasks necessary to discharge the agency's obligation under the Omnibus Reconciliation Act of 1981" (Order, October 1, 1981) and providing that former Community Services Administration employees could be hired by HHS on a temporary basis to perform the closeout, transition and Inspector General functions (Order, October 9, 1981). These clarifications and modifications were made at the request of the defendant.

The dispute leading to the filing of this action by the plaintiff results from a disagreement between the plaintiff, and the former CSA employees it represents, and the defendant as to how HHS should select employees to administer those programs formerly administered by CSA. Plaintiff contends that there has been a transfer of functions from CSA to HHS and that pursuant to the Veterans Preference Act of 1944 (VPA), as amended, 5 U.S.C. § 3503, former CSA employees should be given preference when HHS selects persons to administer those programs transferred to that agency.

The defendant contends that the VPA does not apply to the present transfer from CSA to HHS for two reasons. First, he argues that Congress has specifically exempted the transfer from the coverage of

the VPA by giving the Director of the Office of Management and Budget (OMB) broad discretionary power to terminate the affairs of CSA including the power to "provide for the transfer or other disposition of personnel." Budget Act, § 682(e). Second, the defendant contends that notwithstanding the overall applicability of the VPA to this transfer, the VPA is inapplicable here because there has been no transfer of functions from CSA to HHS.

At this point in time, HHS has not begun to permanently employ persons to administer the former CSA programs, although it has hired some temporary employees pending the resolution of this litigation or the close out of certain aspects of the former CSA programs.

Defendant admits however that it is his intention to select permanent employees to administer the program without reference to the VPA.

II.

In order to prevail on a motion for a preliminary injunction, the plaintiff must demonstrate that the former CSA employees are likely to succeed on the merits, that they lack an adequate remedy of law and would suffer irreparable injury if injunctive relief is not granted, that the other parties will not suffer substantial harm if injunctive relief is granted, and where lies the public interest. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 182 U.S. App. D.C. 220, 559 F.2d 84 (1977); *Virginia Petroleum Jobbers, Inc. v. FPC*,

104 U.S. App. D.C. 106, 259 F.2d 921 (1958).

In the view of the Court, there are two distinct issues presented by the parties. One is a question of law, that being whether Congress has expressly exempted this transfer from the coverage of the VPA, then this dispute is at an end and the defendant would prevail on all issues. Indeed, if the defendant is correct, it is appropriate for the Court to dismiss this action without consideration of the second issue. If the plaintiff is correct that Congress has not exempted the transfer from the VPA, then it is incumbent upon HHS to hire permanent employees to perform any former CSA functions pursuant to the requirements of the VPA. This does not mean however, that all or even the majority of the former CSA

employees will or should be hired by HHS. The number hired would depend upon which functions of CSA have been transferred and whether the functions of particular employees have been transferred.

The second issue then is, assuming that the transfer has not been exempted from the coverage of the VPA, which functions, if any, of the former agency and its former employees have been transferred. The determination of whether there has been a transfer of functions will depend upon a careful review of the functions of the CSA as compared with the functions of the HHS office administering the former CSA programs. A review of the Budget Act makes it appear that some functions have been transferred and that those functions will be continued to be

performed in the new agency for at least one year; however such a determination cannot rest upon a mere review of the statute itself.

The decision whether to grant preliminary injunctive relief depends then on the consideration of the two separate issues stated above.

III.

[1] The first issue is whether Congress has specifically exempted the present transfer from the coverage of the VPA. This is solely a question of law.

The Veterans Preference Act, as amended, provides:

(a) When a function is transferred from one agency to another each preference eligible employed in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving

agency may make an appointment from another source to that position.

(b) When one agency is replaced by another, each preference eligible employed in the agency to be replaced shall be transferred to the replacing agency for employment in a position for which he is qualified before the replacing agency may make an appointment from another source to that position.

5 U.S.C. § 3503. When Congress passed the VPA it "was primarily concerned with the problems caused by major government reorganizations." *McNamara v. Dick*, 116 U.S. App. D.C. 271, 273, 323 F.2d 276, 278 (1963), cert. denied 375 U.S. 895, 84 S.Ct. 171, 11 L.Ed.2d 124.

[2] While the VPA applies to all cases where a "function is transferred from one agency to another" or "one agency is replaced by another" Congress may exempt any transfer from the coverage of

the statute. See *Myers v. Hollister*, 96 U.S. App. D.C. 388, 226 F.2d 346 (1955), cert. denied 350 U.S. 987, 76 S.Ct. 474, 100 L.Ed. 854 (1956); *Kirschner v. United States*, 172 Ct.Cl. 526 (1965). Thus the court in *Myers* ruled that Congress exempted the transfer from the VPA when it provided in the statute in question that the director of the agency shall determine "which individual employees shall be retained." 96 U.S. App. D.C. at 389, 226 F.2d at 347. That it was the intent of Congress to exempt the agency from the coverage of the VPA was also obvious from the statute's legislative history. There the report stated that the director was to carry out the program and determine which employees to retain "without regard to existing statutes, regulations and

procedures for reduction in force." 96 U.S. App. D.C. at 391, 226 F.2d at 349 (citing H.R. Rep. No. 1922, 82d Cong., 2d Sess., 67 68 (1952)).

Similarly in *Kirschner*, *supra* at 527, the court ruled that language to the effect that "notwithstanding any other provision of law" the President shall transfer to the agency "such personnel ... as the President determines to be necessary", exempted the transfer from the VPA.

Here the defendant has failed to direct this Court's attention to language exempting this transfer from the VPA, and of course repeal by implication is not favored. Defendant argues that the provision that the Director of OMB "shall provide for the transfer or other disposition of personnel, assets,

liabilities, grants, ..." exempts the transfer from the VPA. This Court cannot agree. That language can just as easily be construed to support plaintiff's argument in that it refers to a "transfer ... of personnel." Moreover, that portion of the legislative history cited by defendant providing that the Community Services Block Grant "is clearly a new program within [HHS], not a transfer of authority", H.R. Rep. No. 208, 97th Cong., 1st Sess., 767 68 (1981) U.S. Code Cong. & Admin. News, pp. 396, 1128 1130 does not have the effect of exempting the transfer from the coverage of the VPA.

Congress could have specifically exempted the transfer from the requirements of the VPA by simple language but chose not to do so. This being the

case, the Court concludes that it was not Congress' intent to exempt the transfer and that the Veterans Preference Act applies to this transfer. Thus the Court rules as a matter of law that the transfer from CSA to HHS is subject to the coverage of the Veterans Preference Act of 1944, as amended. Having so concluded, it follows that the plaintiff is entitled to injunctive relief requiring the agency (HHS) to screen potential employees having in mind the preferences afforded to former CSA employees by the Veterans Preference Act.

Although this case is before the Court on plaintiff's motion for preliminary injunction, there now appears to be no reason why the Court should not enter a final order on the limited issue of whether the transfer has been exempted

from the coverage of the VPA. The issue has been argued by the parties and raises a question of law. The parties have had a full opportunity to cite relevant cases and statutes in support of their respective positions. Moreover, it is in the best interest of the parties that this limited issue be resolved by the Court at the earliest possible date since the future actions of HHS in filling vacancies for any transferred functions from CSA depend upon whether the VPA applies to the transfer.

Thus the Court will enter a permanent injunction enjoining the defendants from selecting employees to administer the former CSA program without utilizing the

Veterans Preference Act of 1944, as amended.2/

IV.

[3] The Court having concluded that Congress has not exempted this transfer from VPA it is necessary to determine whether there has been a transfer of functions from CSA to HHS and/or a transfer of functions of former CSA employees to HHS. This raises what is primarily a question of fact and requires a careful review of the functions at CSA as compared with the new functions at HHS. As was previously noted, a determination

2/ The Court's permanent injunction on this limited issue is identical to the Court's grant of a temporary restraining order and a preliminary injunction.

on the issue of transfer of functions cannot be based on a simple reading of the statute.

The defendant contends that the Court should not reach this issue but rather should allow the initial determination to be made by the agency with any appeal to the Merit Systems Protection Board. This Court agrees.

The Court has already ruled that Congress has not exempted this transfer from the coverage of VPA. Therefore, this becomes a starting point for the agency in its selection of employees to administer the former CSA programs. The agency should make a good faith effort to review the old and new functions and the individual functions performed at CSA and to be performed at HHS. If the agency

determines that there has been a transfer of functions to HHS then the preferences provided by the VPA apply. Any employee who is dissatisfied with the agency determination may administratively appeal that decision to the Merit Systems Protection Board (Board), 5 U.S.C. § 7701, and if dissatisfied with the decision of the Board, may seek judicial review, 5 U.S.C. § 7703.

As concerns the second issue, that is, whether there has been a transfer of functions, the Court concludes that the former CSA employees have an adequate remedy at a law, that is, the appeal of any adverse determination to the Board. Although this may result in the loss of income for some employees for a short period of time, the Supreme Court has held that such a loss does not constitute

irreparable injury. *Sampson v. Murray*, 415 U.S. 61, 90 92, 94 S.Ct. 937, 952 953, 39 L.Ed.2d 166 (1974). Furthermore, the Board, should the employees prevail, can grant back pay and restoration of benefits. While it is unusual to have an entire agency terminated, which in turn results in a number of cases being brought before the Board, it is noted that the Board can entertain the complaints as a class action. 5 CFR § 1207.27. In the event two or more parties file complaints with the Board, the Board is also empowered to consolidate or join those appeals upon a determination that contain identical issues." 5 CFR § 1201.36. The employees can be represented by the union before the Board. See e.g., *Wells v. Harris*, 1 MSPB 199 (1979). Finally, in

view of the somewhat unique posture of these appeals, time being of the essence, the parties may wish to request expedited consideration by the Board. See 5 CFR § 1201.41(b).

Time is of the essence and expedited resolution is in the best interest of the former CSA employees because some of them will be without employment, the agency because it has a program to administer, and the public because the efficient administration of the program is in their best interest. The Court concludes that these issues should be resolved first upon initiation by the agency and then upon appeal to the Board with a possibility of judicial review if the employees are not satisfied.

In view of the above, with respect to the issue involving whether there was a

transfer of functions under the Veterans Preference Act, the Court rules that that is an issue properly presented to the Merit Systems Protection Board with review by the Court of Claims or the Court of Appeals.

V.

To summarize, the Court concludes that Congress has not exempted the subject transfer from the coverage of the Veterans Preference Act of 1944, as amended, and that the defendant in selecting employees to fill those functions transferred from CSA to HHS is required to accord preference to the former CSA employees. Since this is an issue of law and all parties have had an opportunity to brief and argue the questions the Court will enter a final injunction order. See Fed.

R. Civ. P. 65(a)(2). Thus, the Court shall direct that the defendants are permanently enjoined from selecting employees to administer functions which have been transferred to HHS from CSA without according those employees preference under the Veterans Preference Act of 1944, as amended. This shall constitute the final order of the Court on this limited issue.

As to the issue concerning whether there has been a transfer of functions under the Veterans Preference Act, the Court concludes that that issue should not be entertained by the Court in the absence of the former CSA employees exhausting any administrative remedies.

The initial decision whether there has been a transfer of functions should be

made by the agency. Any employee dissatisfied with the agency determination may process his appeal to the Merit Systems Protection Board. Of course, any employee who disagrees with the Board's determination may seek judicial review. The fact that the employee may administratively appeal to the Board with a further right of judicial review satisfies this Court that on the second issue, the question of whether there has been a transfer of functions, the employees have an adequate remedy at law. The Board, if it upheld those claims, may grant appropriate relief including back pay and restoration of benefits. This being the case these plaintiffs will not suffer irreparable injury. See Sampson v. Murray, supra.

In view of the above, the Court must deny plaintiff's request for a preliminary injunction on the second issue. Indeed, on that issue, the Court concludes that the appropriate remedy is for the CSA employees to exhaust their administrative remedies. Since plaintiffs have failed to do so up to this time, this aspect of the case must be dismissed.

An appropriate order shall issue.

ORDER

It is hereby

ORDERED that the attached Memorandum and Order, both dated October 16, 1981, are substituted for the Memorandum and Order filed on the date. The attached Memorandum and Order make no substantive changes to the original ruling of the Court.

ORDER

Pursuant to the Memorandum filed in this case on October 16, 1981, the Court concludes as follows:

First Issue. Congress has not exempted the transfer of anti poverty programs from the Community Services Administration to the Department of Health and Human Services, see Omnibus Budget Reconciliation Act of 1981, from the coverage of the Veterans Preference Act of 1944. The plaintiff is therefore entitled to a permanent injunction on the first issue.

Second Issue. The question of whether there has been an actual transfer of functions from the Community Services Administration to the Department of Health and Human Services is a question of fact. Plaintiff, and the employees it

represents, have an adequate remedy at law, that is, once the agency has made its determination, those former employees of the Community Services Administration who are dissatisfied may appeal to the Merit Systems Protection Board pursuant to 5 U.S.C. § 7701. This being the case, the plaintiff and the employees it represents, will not suffer irreparable harm if injunctive relief is denied, and moreover they have failed to exhaust their administrative remedies. The second issue before the Court must therefore be dismissed.

In view of the above, it is hereby
ORDERED, as to the First Issue, that the defendant, his officers, agents, servants, employees and those persons in active concert and participation with him

are permanently enjoined from selecting employees to administer the former Community Services Administration programs without giving preferences as required by the Veterans Preference Act of 1944, and it is further

ORDERED, as to the Second Issue, that the plaintiff and the employees it represents, not having exhausted their administrative remedies, this aspect of the case is dismissed.

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

RAYMOND C. AHLBERG,	)	Appeal Nos. 86 881
et al.,	)	86 882
	)	86 892
Petitioners,	)	86 895
	)	86 943
v.	)	86 945
	)	86 946
DEPARTMENT OF HEALTH	)	86 947
AND HUMAN SERVICES,)	
)	
Respondent.)	

Before FRIEDMAN, Circuit Judge, COWEN,
Senior Circuit Judge, and NIES, Circuit
Judge.

ORDER

A petition for rehearing having been
filed in this case, UPON CONSIDERATION
THEREOF, IT IS

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

Francis X. Gindhart, Clerk

12-16-86

Date

cc: Mr. Phillip R. Kete
Mr. Van Teasley, DOJ

UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT

CORRECTED

RAYMOND C. AHLBERG,	)	Appeal Nos. 86 881
et al.,	)	86 895
)	
Petitioners,)	
)	
v.)	
)	
DEPARTMENT OF HEALTH)	
AND HUMAN SERVICES,)	
)	
Respondent.)	

Before FRIEDMAN, Circuit Judge, COWEN,
Senior Circuit Judge, and NIES, Circuit
Judge.

ORDER

A petition for rehearing having been
filed in this case, UPON CONSIDERATION
THEREOF, IT IS

450a

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT

Francis X. Gindhart, Clerk

12 17 86

Date

cc: Mr. Phillip R. Kete
Mr. Van Teasley, DOJ

STATUTES AND REGULATIONS

1. 5 U.S.C. § 3503 (1981)
 - (a) When a function is transferred from one agency to another, each competing employee in the function shall be transferred to the receiving agency for employment in a position for which he is qualified before the receiving agency may make an appointment from another source to that position.
 - (b) When one agency is replaced by another, each competing employee in the agency to be replaced shall be transferred to the replacing agency for employment in a position for which he is qualified before the replacing agency may make an appointment from another source to that position.
2. 5 C.F.R. Part 351 (pertinent provisions)

Part 351 - REDUCTION IN FORCE

§ 351.201. Use of regulations.

- (a) Each agency shall follow this part when it releases a competing employee from his/her competitive level by separation, demotion, furlough for more than 30 days, or reassignment requiring displacement, when the release is required because of lack of work, shortage of funds, reorganization, reclassification due

to change in duties, or the exercise of reemployment rights or restoration rights.

§ 351.302

(a) Before a reduction in force is made in connection with the transfer of any or all of the functions of a competitive area to another continuing competitive area, each competing employee in a position identified with the transferring function or functions shall be transferred to the continuing competitive area without any change in the tenure of his or her employment.

(b) An employee whose position is transferred under this subpart solely for liquidation, and who is not identified with an operating function specifically authorized at the time of transfer to continue in operation more than 60 days, is not a competing employee for other positions in the competitive area gaining the function.

(c) Regardless of an employee's personal preference, an employee has no right to transfer with his or her function, unless the alternative in the competitive area losing the function is separation or demotion.

§ 351.401. Determining retention standing.

Each agency shall determine the retention standing of each competing employee on the basis of the selection factors in this subpart and in Subpart E of this part.

§ 351.403 Competitive level.

(a) Each agency shall establish competitive levels consisting of all positions in a competitive area and in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program. Sex may not be a basis for assigning a position to a competitive level, except for a position for which restriction of certification of eligibles by sex is found justified by OPM.

§ 351.404 Retention register.

(a) When a competing employee is to be released from a competitive level under this part, the agency shall establish a separate retention register for that competitive level.

. . .

§ 351.602 Order of release from competitive level.

Each agency shall select competing employees for release from a competitive level under this part in the inverse order of retention standing, beginning with the employee with the lowest retention standing on the retention register. When employees in the same retention subgroup have identical service dates and are tied for release from a competitive level, the agency may select any tied employee for release.

§ 351.603 Actions

Subject to Subpart G of this part, when an agency selects an employee for release from his competitive level, it shall:

(a) Assign him with his consent to a position for which he is qualified which will last at least 3 months;

(b) Furlough him; or

(c) Separate him.

§ 351.703 Assignment involving displacement

(a) An agency shall assign under § 351.603 a group I or II employee in a position in the competitive service, rather than furlough or separate him, to a position in the competitive service in another competitive level in his competitive area which requires no reduction, or the least possible reduction, in representative rate when a position in

the other competitive level is held by an employee:

- (1) In a lower subgroup; or
- (2) With lower retention standing in a position from which the group I or II employee was promoted or an essentially identical position.

3. 351 Federal Personnel Manual ¶ 5-3
Personnel Management Implications of
Transfer of Functions

* * *

d. Employees of the gaining competitive area.

* * *

(2) Use of reduction-in-force regulations. If the losing competitive area identifies and transfers more employees than the gaining competitive area needs to carry on the function, the gaining competitive area may follow reduction-in-force procedures to relieve the surplus. Competing employees identified by the losing competitive areas have a right to:

(a) transfer to the gaining competitive area before it conducts a reduction in force; and

(b) compete among themselves and employees in the gaining competitive area for retention under the OPM's reduction-in-force regulations.

e. Rights of incoming employees.

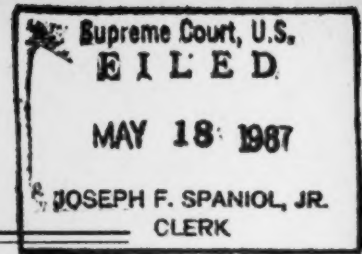
(1) A determination of the rights of the incoming employees does not require a physical relocation or a paper transfer to the gaining competitive area. Their rights can be determined from a mingling of the retention registers of the segment being transferred with the appropriate registers of the competitive area receiving the function.

(2) If any of the incoming employees compete unsuccessfully for retention in the gaining competitive area they need not be transferred in order to be separated. They may be separated from the losing competitive area acting as an agent for the gaining competitive area if the necessary arrangements for lumpsum leave and severance payments can be worked out.

(3) Employees who are unsuccessful in competing for positions in the gaining competitive area are placed on the reemployment priority list of the gaining competitive area (covered in subchapter 8 of this chapter).



(3)
No. 86-1287



In the Supreme Court of the United States

OCTOBER TERM, 1986

RAYMOND C. AHLBERG, ET AL., PETITIONERS

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

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**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

Petitioners contend that they were wrongfully separated from the Community Services Administration when that agency was abolished by statute in 1981. The decision below is correct. Petitioners do not allege, nor is there, a conflict among the circuits on any of the questions presented, and there is no conflict with any decision of this Court. The questions presented raise no significant legal issue, and are substantially similar to those on which certiorari was denied in *Menoken v. Department of Health and Human Services*, No. 86-93 (Oct. 14, 1986). Accordingly, review by this Court is not warranted.

I. a. Prior to September 30, 1981, the Community Services Administration (CSA) was responsible for administering federal anti-poverty program grants to community agencies. The Omnibus Budget Reconciliation Act of 1981

(OBRA), Pub. L. No. 97-35, 95 Stat. 357, however, eliminated the CSA and created the Office of Community Services (OCS), a new agency within the Department of Health and Human Services (HHS), to administer the block-grant program created by OBRA (Pet. App. 3a, 237a-240a). Unlike the CSA, which had more than 900 employees, the OCS had only 165 employees to carry out its functions (Pet. App. 4a).

After OBRA was signed into law, the CSA notified its employees that all positions at the agency would be abolished, that no reassignments were available, and that all employees would be separated by September 30, 1981. Shortly after that date, however, the United States District Court for the District of Columbia ruled that, under the Veterans Preference Act of 1944, 5 U.S.C. 3502-3503, HHS was required to reassign CSA employees to the OCS insofar as the CSA's functions were transferred to that agency. *National Council of CSA Locals v. Schweiker*, 526 F. Supp. 861 (D.D.C. 1981) (Pet. App. 420a-446a). HHS then offered the 165 positions that existed in the newly created OCS to those former CSA employees with the highest retention standing based upon preference order master lists. HHS created these lists because the CSA had not maintained adequate personnel records, a fact that prevented HHS from reconstructing exact reduction-in-force priority registers for CSA employees (Pet. App. 4a-5a, 241a-247a).

Former CSA employees not selected under this procedure appealed to the Merit Systems Protection Board (MSPB), claiming that they were unlawfully separated from the CSA and that they were entitled to be reinstated with back pay to positions with the OCS until the OCS properly carried out its own reduction-in-force. The MSPB agreed that HHS had not followed correct procedures for determining which former CSA employees should be transferred to the OCS, but it concluded that this failure did not

invalidate the entire reduction-in-force. Rather, the MSPB held that the appropriate remedy was to allow each former CSA employee to prove that he or she was entitled to a position with the OCS (Pet. App. 5a-7a, 247a-253a).

The former CSA employees appealed to the United States Court of Appeals for the Federal Circuit, which upheld the MSPB's decision. *Certain Former CSA Employees v. Department of Health and Human Services*, 762 F.2d 978 (1985) (Pet. App. 236a-277a). The court of appeals agreed that HHS's use of the master retention lists was not in literal compliance with normal reduction-in-force procedures, but it held that HHS nonetheless had afforded the former CSA employees all of the rights to which they were entitled under the Veterans Preference Act (Pet. App. 264a-265a, 269a-270a). The court concluded that any possible errors in the reassignment process could be corrected by the procedure that the MSPB had adopted: that is, to afford an opportunity on remand to each former CSA employee, including petitioners, to show that he or she was entitled to an OCS position that had been erroneously assigned to another former CSA employee (Pet. App. 265a-266a).

In the first case to reach the court of appeals following this remand, a former CSA employee challenged the MSPB's use of the master retention lists in deciding whether her individual claim to specific positions had merit. The Federal Circuit held that it had intended to give the MSPB broad discretion in determining the relative retention priorities of individual employees, and that the MSPB had not abused its discretion in using the master lists in deciding that employee's case. This Court denied certiorari. *Menoken v. Department of Health and Human Services*, 784 F.2d 365 (Fed. Cir.), cert. denied, No. 86-93 (Oct. 14, 1986) (Pet. App. 278a-298a).

b. In this case, as in *Menoken*, petitioners challenge the disposition of individual claims by the MSPB following the remand approved in *Certain Former CSA Employees*. Petitioners are two groups of employees separated from their positions when the CSA was abolished (Pet. App. 8a). The first group consists of individuals formerly employed in the CSA offices in Boston and Seattle. On remand, these petitioners either failed to make any submission at all to the MSPB (*id.* at 10a-11a) or failed to make a submission sufficient to show that they were entitled to specific OCS positions that had been assigned to other former CSA employees (*id.* at 12a-14a). The court of appeals held that, in the absence of such submissions, the MSPB had properly upheld denial of hearings on their claims of wrongful discharge (Pet. App. 14a-30a). Petitioners do not challenge this aspect of the court of appeals' decision in this Court.

The second group of petitioners consists of individuals formerly employed in the Atlanta and Kansas City offices of the CSA. These individuals did make submissions on remand to the MSPB sufficient to entitle them to a hearing. Following hearings on their claims, however, the MSPB presiding officials determined that these former CSA employees had not established that there were positions at OCS for which they had higher retention rights than the other former CSA employees who had been transferred to the identified positions.

The MSPB upheld these determinations, and the court of appeals affirmed. Petitioners' sole contention was that the MSPB was required to construct standard reduction-in-force registers to determine their retention rights, and that the Board therefore had erred in using the master retention lists in determining individual entitlement to positions at OCS (Pet. App. 31a). Noting that it had "specifically rejected that contention in *Menoken*," the court of appeals reaffirmed its conclusion that HHS was not required to

recreate reduction-in-force registers and that the MSPB had not inappropriately relied on the master lists in rejecting petitioners' claims (Pet. App. 30a-34a).

2. a. Petitioners reiterate (Pet. 6-11) the same contention that was advanced in *Certain Former CSA Employees* and in *Menoken*—namely, that the separation of all CSA employees when that agency was abolished was null and void because HHS was required to transfer all CSA employees to the new OCS and then to conduct a reduction-in-force in a manner consistent with applicable regulations. The court of appeals properly rejected this argument in light of the unusual factual circumstances in this case: the abolition of an entire agency, coupled with an alteration in its function resulting in the need for only 165 rather than 900 employees in the successor agency. The court's decision does not, as petitioners contend (Pet. 7-9), conflict with *Vitarelli v Seaton*, 359 U.S. 535 (1959). As the Federal Circuit explained in *Certain Former CSA Employees*, "[t]he present case is far removed from *Vitarelli*" (762 F.2d at 984; Pet. App. 263a). There, a single employee was discharged on the ground that he was a security risk, in violation of the agency's procedures, and this Court held that he should be reinstated. 359 U.S. at 539-546. Here, the sheer number of employees involved and the inadequacy of CSA's records made the conduct of an ordinary reduction-in-force difficult if not impossible, so that there was a significant impediment to following the agency's prescribed separation procedures that did not exist in *Vitarelli*. For that reason, the remedy adopted here by the MSPB—that is, to allow each former CSA employee to show that he or she was entitled to a position with the OCS, rather than to invalidate the entire reduction-in-force—was "a reasonable method of dealing with perhaps a unique and certainly a most unusual situation," a remedy that "fairly and appropriately adjusted and accommodated" the respective interests of the former CSA employees and the government

(*Certain Former CSA Employees*, 762 F.2d at 985; Pet. App. 271a). Petitioners' argument in essence is that they and more than 700 individuals whose jobs no longer exist should receive a back pay award from the Treasury for a five-year period during which they did no work and during which it was impossible for them to do any work. The court of appeals properly rejected that argument in *Certain Former CSA Employees* and in *Menoken*, and it properly rejected that argument for the third time here.

b. Petitioners' contention (Pet. 11-13) that the MSPB improperly relied on the master retention lists in deciding their individual claims is both fact-bound and erroneous. To support this argument they assert (Pet. 12) that the Federal Circuit in *Certain Former CSA Employees* stated that it was possible to recreate standard reduction-in-force registers despite the inadequacies of CSA's personnel records. In fact, however, the court in that case simply held that it was possible to determine the *relative retention rights* of persons not appointed to new positions at OCS (762 F.2d at 985; Pet. App. 267a-268a). As the court of appeals made clear in *Menoken*, it did not intend to require that the determination of relative retention rights be accomplished by reconstruction of "traditional reduction-in-force registers" on remand (784 F.2d at 370; Pet. App. 297a). Rather, the court intended to give the MSPB considerable discretion in determining the standards for resolution of individual claims. Petitioners here do not point to a single instance in which use of the master lists resulted in the failure to award a position to an individual who would have been entitled to that job if standard reduction-in-force registers had been used. The court of appeals properly rejected petitioners' broad-scale attack on procedures that represented a practical and equitable way of dealing with a highly atypical situation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MAY 1987

In The

Supreme Court of the United States

October Term, 1986

RAYMOND C. AHLBERG, *et al.*,

Petitioners,

vs.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES,

Respondent.

*On Petition for Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit*

REPLY BRIEF FOR PETITIONERS

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No. 86-1287

In The

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of Appeals for the Federal Circuit*

REPLY BRIEF FOR PETITIONERS

As recognized by the agency, petitioners complain of two distinct violations of civil service regulations. The first (addressed in section 2a of the opposition memorandum), occurred on October 1, 1981, when they were separated in violation of the regulation which required that they be transferred to the

Department of Health and Human Services.¹ The second (addressed in section 2b of the opposition memorandum) occurred when the Merit Systems Protection Board used an ad hoc method devised by the agency itself, rather than the procedures in the reduction in force regulations, to determine which former CSA employees would have been retained had a reduction in force been conducted concurrent with the transfer of function.

As the agency stressed, in *Menoken v. Dept. of Health and Human Services*, No. 86-93 (Oct. 14, 1986), the pro se petitioner emphasized her "fact-bound" contention that "she was entitled to one of several positions in OCS." *Menoken*, Memorandum for Respondent in Opposition at 3. Here, in contrast, no facts are in dispute; there is not even a dispute as to how to apply the regulations to the facts. This Court is asked to reverse an express judicial approval of the conceded violation of regulations by agencies bound by them.

1. The regulation upon which the first issue is based governs the case when the disparity between the number of employees entitled to transfer and the number needed at the receiving agency is so great that a reduction in force will be needed. Under those conditions, according to the regulation, the employees are first to be transferred and then the gaining agency may carry out any necessary reduction in force:

If the losing competitive area identifies and

1. Petitioners argue that their separations in violation of this regulation were null and void. There are only 29 petitioners (plus approximately 20 other former CSA employees whose cases are still pending before the MSPB or the court of appeals. It is not at all clear why a ruling in the present petitioners' favor would mean that they "and more than 700 individuals whose jobs no longer exist should receive a back pay award from the Treasury for a five-year period." (Opp. 6). It is not even clear where the agency got its five year figure from.

transfers more employees than the gaining competitive area needs to carry on the function, the gaining competitive area may follow reduction-in-force procedures to relieve the surplus. Competing employees identified by the losing competitive area have a right to:

(a) transfer to the gaining competitive area before it conducts a reduction in force. . . .

351 FPM § 5-3(d)(2) (emphasis added).

The error as to which all the petitioners seek remedy is that, as is undisputed, instead of a transfer followed by reduction in force determination of who would no longer be necessary, there was a simple wholesale separation of every single employee.

Two reasons are suggested to justify this. The Federal Circuit cites the fact that there were more employees entitled to transfer than there were positions needed at HHS (Pet. App. 263a-264a); this fact, however, merely meant that the regulation applied, not that it need not be complied with. When the Federal Circuit cites the very facts which make the regulation applicable, as meaning that separations in violation of it are not nullities, it has rendered the regulation non-binding. The agency's opposition memorandum does not even claim that treating the transfer regulation as unenforceable is consistent with *United States v. Nixon*, 418 U.S. 683 (1974); *Morton v. Ruiz*, 415 U.S. 199 (1974); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); and *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).²

2. The agency's memorandum also ignores the problems that would be caused by treating the regulations as enforceable, but only through pre-violation injunctive relief. See our petition at 13-4.

The agency suggests an alternative reason for condoning the violation of the transfer regulation: that the government's failure to properly maintain its personnel records would have created impediments to carrying out a proper reduction in force immediately after the transfer of function (Opp. 5). The cases we rely on, however, do not allow the government to avoid compliance with its own regulations merely by creating conditions which make compliance more difficult or expensive than it otherwise would be.

2. The second violation complained of came in the proceedings before the Merit Systems Protection Board. The regulation quoted above goes on to specify that the reduction in force which often accompanies a transfer of function³ must be accomplished under the established reduction in force procedures:

Competing employees identified by the losing competitive area have a right to:

* * *

(b) compete among themselves and employees in the gaining competitive area for retention under the *OPM's reduction-in-force regulations*.

351 FPM § 5-3(d)(2) (emphasis added).

Several of the MSPB regional offices, eventually with the approval of the full board and of the Federal Circuit, interpreted the consolidated decisions as holding that remedy should be given

3. As noted in our petition, at least one transfer of function with concomitant reduction in staffing is currently in the works. Petition at 10-11.

those who would have survived a reduction in force concurrent with the transfer of function, but that the reduction in force regulations, 5 C.F.R. Part 351, should be ignored in making these determinations — that, instead, a master retention list system devised by the agency itself should be used.

The agency apparently agrees that as a general matter the cases we rely on — *United States v. Nixon*, 418 U.S. 683 (1974); *Morton v. Ruiz*, 415 U.S. 199 (1974); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); and *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954) — hold that when there is a question whether particular regulations were complied with the adjudicator compares the facts to the requirements of those regulations, not to a set of procedures which concededly violate those regulations. Thus, one issue in *Service* was whether, in fact, “petitioner’s discharge was consistent with the Department’s regulations.” 354 U.S. at 382. The Court resolved that question by reference to those regulations, not to ad hoc procedures established by the agency as a reasonable method for dealing with the situation. 354 U.S. at 382-9.

Here, there is not even a claim that the regulations were followed. The agency does suggest two reasons why a conflict between the Federal Circuit’s decision and the cases we rely on should not be resolved.

First, the agency denies that the consolidated decision explicitly found that reconstruction of a proper reduction in force was possible (Opp. 6). Even were the agency correct, the fact would remain that the decision nowhere says that reconstruction is not possible, or gives any other reason for not relying on the regulations.

In any event, the agency’s interpretation of the disputed passages in the Federal Circuit opinion is untenable. After reciting

that the agency had created the master retention list system in order to place former CSA employees in the belief that the retention rights under the regulations could not be calculated (Pet. App. 246a-247a), the Federal Circuit used language which can be interpreted only as a rejection of the agency's excuse:

[T]he Board rejected the Department's contention that the retention rights of individual employees who had not been appointed to positions with the Office of Community Services could not be determined.

(Pet. App. 267a).

Indeed, if the Federal Circuit intended to find that reconstruction of the records was impossible rather than possible, it would not have stressed the expert witness's testimony that

the necessary information could be obtained through a procedure known as a "desk audit," and that one "could conduct a regular desk audit after an agency has been abolished."

(Pet. App. 268a).

The agency attempts to explain these passages as holding only that it is possible, after the fact, to determine relative retention rights under the master retention list system (Opp. 6). But if the court and the board were endorsing the system the agency had already used, the court would not cite the board as rejecting the agency's position. Similarly, since the master list system was created expressly to avoid the necessity of correcting the personnel records in order to comply with the regulations, the court's stress on the ability to correct the records through post-abolition desk

audits can mean only that the standard procedures could be followed.

The agency's second argument challenges petitioners to "point to a single instance in which use of the master lists resulted in the failure to award a position to an individual who would have been entitled to that job if standard reduction-in-force registers had been used." (Opp. at 6). In the Seattle remand proceedings, the administrative judge held reduction in force procedures had to be followed and therefore awarded a particular GS 12 position to Charles van Pelt in preference to Richard Putnam (Pet. App. 182a-183a). Mr. Putnam appealed to the full board, which held that the master retention list system had to be used, and reversed the denial of relief to him. *Putnam v. Dept. of Health and Human Services*, 31 M.S.P.R. 427 (1986).⁴

4. There is pending before the board a motion for clarification filed by the agency, pointing out that "on its face the Order [in *Putnam*] appears to require the agency to pay both Putnam and Van Pelt for performing the same job." Motion for Clarification, *Putnam v. Dept. of Health and Human Services*, SE03518210127-1, Sept. 8, 1986. The board has consistently held, in cases involving other CSA appellants, that the agency must bear the risk of inconsistent decisions under similar circumstances. *Carpenter v. Dept. of Health and Human Services*, 30 M.S.P.R. 690 (1986); *Jenkins v. Dept. of Health and Human Services*, 30 M.S.P.R. 693 (1986); and *Alston v. Dept. of Health and Human Services*, 30 M.S.P.R. 697 (1986). Since presumably Messrs. Putnam and Van Pelt agree they both won their cases, neither has yet had a reason to seek judicial review.

CONCLUSION

The agency's memorandum in opposition has failed to show that the Federal Circuit decisions in these cases are anything but directly contradictory to the decisions of this Court.

Respectfully submitted,

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